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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1213

GLICK BROTHERS LUMBER COMPANY, a California Corporation, MAX GLICK, OSCAR GLICK, ADOLPH GLICK, DAVID GLICK, ISRAEL GLICK and LABEL GLICK, individually, and doing business as Glick Brothers Lumber Company,

Petitioners,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

GLICK BROTHERS LUMBER COMPANY, a California Corporation, MAX GLICK, OSCAR GLICK, ADOLPH GLICK, DAVID GLICK, ISRAEL GLICK and LABEL GLICK and doing business as Glick Brothers Lumber Company,

Petitioners,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices Thereof:

Your petitioners, The Glick Brothers Lumber Company, Max Glick, Oscar Glick, Adolph Glick, David Glick, Israel Glick and Label Glick, individually and doing business as Glick Brothers Lumber Company, respectfully petition this Honorable Court for a Writ of Certiorari to the Ninth Circuit Court of Appeals, and in respect thereto, allege as follows:

I.

Jurisdictional Statement.

Jurisdiction is conferred upon this Court by Title 28, Section 347, United States Codes, Annotated, and by the Emergency Price Control Act of 1942 and as amended (Act January 30, 1942, C. 26, 56 Stat. 23, Title 50, App. Sec. 901-946); Stabilization Act of 1942, Act of October 2, 1942, C. 578, 56 Stat. 765; Title 50 App. Sec. 961; Stabilization Act of June 30, 1944, C. 325, Title 1, Sec. 105, 58 Stat. 632, 638.

The Office of Price Administration filed a suit in the District Court of the United States on October 1, 1943 in 3 counts against the defendants. It alleged jurisdiction of the action under Section 205(e) of the Emergency Price Control Act of 1942. Thereafter appropriate motions were made to dismiss the complaint for failure to state a claim upon which relief could be granted and to suppress the evidence for having been unlawfully searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States. The motion to suppress the evidence was granted and the motion to dismiss was granted. The opinion was given from the bench, but separate orders and judgments were entered on different days as to each. Thereafter, the Government gave notice of appeal from the judgment and the order of suppression of the evidence and on January 4, 1945 the Ninth Circuit Court of Appeals rendered its judgment reversing the judgment of dismissal of the District Court and also reversing the order

suppressing the evidence [R. 478]. A petition for rehearing was filed within the time allowed by law and extensions thereof granted by the Circuit Court, which petition was filed on March 15, 1945, and on March 26, 1945, the Court denied the petition for rehearing [R. 493] and stayed the mandate until April 30, 1945 to allow the petitioner herein, who was your appellee in the Circuit Court of Appeals, to petition your Honorable Court for writ of certiorari. The decision of the Circuit Court of Appeals on the dismissal was a final decision. It is the contention of the petitioner herein that the Circuit Court of Appeals had no jurisdiction to reverse the order of the District Court to suppress the evidence, as that order was an interlocutory order. (*Cobbledick v. United States,* 309 U. S. 323, 84 L. Ed. 783.)

It is also the contention of the petitioner herein that the Circuit Court failed to pass on one of the principle points raised by the appellee in the District Court, and renewed in the Circuit Court of Appeals and that its failure to pass on this question confers jurisdiction on this Court to hear and determine the same under authority of *Helvering v. Gowring,* 302 U. S. 238, 82 L. Ed. 224.

II.

The pertinent portions of the Emergency Price Control Act under consideration are in the Appendix.

Statement of Facts.

Appellees have been in the lumber business for twenty years, bearing an excellent reputation for honesty and fair dealing.

On June 1, 1943, two investigators of the Office of Price Administration, without any previous accusation or complaint and without advising defendants that they were likely to be charged with a violation, went on a roving, exploratory search, and entered the Glick Brothers Lumber Company at 8523 South Alameda Street, in the City of Los Angeles. They were on a "fishing expedition."

The officers thereafter, without any legal process, search warrant, subpoena, or pretended process, rummaged through the private invoices and files of the defendants. They used a back room for their purpose, and a back door to the plant, from which they left each night, clandestinely taking invoices and papers in brief cases to the Office of Price Administration for the purpose of having them photostated, without the consent of anyone. After photostating them the originals were usually returned the next day to the defendants. [R. 31.] **This was without the knowledge or consent of the defendants.**

These proceedings were followed by demands by officers and agents of the Office of Price Administration for huge sums of money on claimed, but unexplained, violations of O. P. A. regulations. These demands varied, being at one time for $14,000, at another time for $21,000, and another time for $42,000 [R. 23], with further threats that demand would be made for $90,000 unless the claims of the Office of Price Administration were "settled." [R. 87.]

All of the alleged claims of the Office of Price Administration were denied by the defendants, who made deter-

mined but unsuccessful efforts to find out how or in what manner there had been any violations of O. P. A. regulations on their part.

On August 12, 1943, formal written notice was served on the Office of Price Administration, its officers and agents, objecting to the unlawful search and seizure of the private papers, documents, books and records and the removal of the same from the premises of the defendants, as being in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

A second notice was served on the Office of Price Administration and their agents on September 10, 1943. In spite of these notices the search continued.

The complaint in count 1 charges, after certain preliminaries, as follows:

> "6. From and including October 1, 1942, more than six months after the effective date of the Act, to and including September 30, 1943, the defendants, and each of them, dealers in lumber, doing business at 8423 South Alameda Street, in the City of Los Angeles, State of California, sold and delivered at Wholesale various grades and kinds of lumber to various and divers customers. None of said purchases was made for use or consumption other than in the course of trade or business. The defendants, and each of them, demanded and received a price or consideration for each such delivery of said lumber in excess of the maximum price established therefor by the General Maximum Price Regulation.
>
> 7. Three times the aggregate amount by which the prices received by the defendants, and each of them, referred to in Paragraph 6, above, exceeded the

maximum prices provided by the General Maximum Price Regulation, equals Fourteen Thousand Four Hundred Thirty Dollars and Sixty-six Cents ($14,430.66). [R. 3 and 4.]"

In count 2 it charges as follows:

"3. From and including October 1, 1942, more than six months after the effective date of the Act, to and including September 30, 1943, the defendants (3), and each or them, dealers in lumber, doing business at 8423 South Alameda Street, in the City of Los Angeles, State of California, sold and delivered at wholesale shipments of lumber to various and divers customers. None of said purchases was made for use or consumption other than in the course of trade or business. The defendants, and each of them, demanded and received a price or consideration for each such delivery of said lumber in excess of the maximum price established therefor by Maximum Price Regulation No. 215, as amended.

4. Three times the aggregate amount by which the prices received by the defendants, and each of them, referred to in Paragraph 3 above, exceeded the maximum prices provided by Maximum Price Regulation No. 215, as amended, equals Fourteen Thousand Two Hundred Sixty-four Dollars and Fifty-two Cents ($14,264.52). [R. 4 and 5.]"

Count 3 charges as follows:

"2. The Administrator is informed and believes, and upon such information and belief alleges that from and including October 1, 1942, more than six months after the effective date of the Act, to and including September 30, 1943, the defendants, and each of them, dealers in lumber, doing business at 8423 South Alameda Street, in the City of Los An-

geles, State of California, sold and delivered at wholesale various grades and kinds of lumber to various and divers customers. None of said purchases was made for use or consumption other than in the course of trade or business. The defendants, and each of them, demanded and received a price or consideration for each such delivery of lumber in excess of the maximum price established therefor by General Maximum Price Regulation.

3. The Administrator is informed and believes, and therefore alleges, that three times the aggregate amount by which the prices received by the defendants, and each of them, referred to in Paragraph 2 above, exceeded the maximum prices provided by the General Maximum Price Regulation (4), equals Six Thousand Dollars. [R. 5.]"

None of these counts alleged the specific violations, but all of them were group counts, without any specifications *of any* facts. Several motions were filed as responsive pleadings and otherwise.

1. Motion to suppress and for return of evidence illegally searched and seized was filed on the ground that it was in violation of the Fourth and Fifth Amendments to the Constitution of the United States. [R. 12.]

2. Motion to strike the complaint on the grounds that the evidence upon which the said complaint is based was secured by unlawful search and seizure, in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

3. That Section 205e inherently and as construed and applied in this complaint is unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States in that it is too vague, indefinite and un-

certain to furnish authority for the bringing of this action.

4. Count 3 is based solely on information and belief. [R. 12.]

A motion to dismiss for failure to state a claim upon which relief may be granted was filed on the ground:

1. That the complaint fails to state a claim or claims against the defendants or any of them, upon which any relief can be granted.

2. To dismiss the action on the ground that the evidence was secured by an agency of the United States in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

3. To dismiss the action on the ground that subsection (e) of section 205 of the Emergency Price Control Act of 1942 is unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States.

4. To dismiss the action on the ground that the Court lacks jurisdiction because it is not shown by the complaint that any person or persons have been damaged. [R. 15, 16.]

5. In the Circuit Court of Appeals a motion to dismiss was filed on the ground that the amendment to the Act terminated the alleged cause of action for treble damages as filed, as the complaint did not allege wilfulness.

It appears that starting on or about the month of June, 1943, two investigators of the Office of Price Administration entered the premises of the petitioners. There had been no complaint made to them, nor did they have any

process, but they commenced to go through the books and records and files in the private vault of the petitioners, taking such documents as they wished without any knowledge or consent on the part of the petitioners, removing them to the Office of Price Administration each night and photostating them [R. 9] and returning them after they had been photostated. That they made a spot check of two months' counts and then began making demands upon the petitioners for various sums of money, one time being $42,000, another time $21,000, another time $14,000, and another time $28,000 and another time $90,000. [R. 23, 26.] They were also told that it would cost the petitioners $500 per day for the agents to examine the group of files; petitioners on or about August 7, 1943, gave written notice to the investigators of the Office of Price Administration as follows:

> "The Glick Brothers Lumber Company and Max Glick, Oscar Glick, Adolph Glick, David Glick, Label Glick and Israel Glick, object to the unlawful search and seizure of its papers, documents, books and records, and removal of same from the premises, as in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and its civil rights, pursuant to the Constitution and statutes made and provided therefor."

And W. N. MacAdam, who served the notices upon the investigators and the officers of the Office of Price Administration, told the investigators not to steal any more papers from the office of the Glick Brothers for any purpose whatsoever. [R. 104.]

On September 10, 1943, another notice was served by the petitioners upon the two investigators and also Joseph K. Coady, Enforcement Attorney at the Office of Price Administration, to the taking or use of any of its records, files or documents or the inspection or search or seizure of the same as being in violation of its constitutional and statutory rights. [R. 104.]

After the receipt by the investigators of the first notice they then came back daily in the face of the written objections, and conducted an exploratory search through other records and papers prior to the filing of the actions.

The only evidence upon which the action was based was the search and seized papers of the petitioners. Upon the coming into Court, and upon the making of the various motions, the Court, after reading the affidavits and considering the evidence, granted the motion of the petitioners to suppress the evidence. This motion was granted. [R. 422.] The motion to dismiss was granted also. [R. 24.] The Court stated in connection with his granting of the motion, as follows:

> "The Court: Is there anything further to offer on the part of the Government? Have you anything further to offer?
>
> Mr. Breitenbach: I believe not, Your Honor.
>
> It is my understanding they will be submitted at this time.
>
> The Court: I am prepared to rule now.
>
> The motion to suppress and return the evidence in Glick case is granted.
>
> I had hoped to have time to write an extended written opinion and set forth all of my reasons; but the press of other matters will not permit, and the

parties are anxious, of course, that this matter shall get on its way.

I am mindful of the arguments that were made by the Government of the necessity for maintaining all of the guards against inflation; but at the same time I cannot escape the thought that the Bill of Rights was written into the Constitution of the United States by men who had just fought a war. They themselves had completed fighting the war of the Revolution, and drafted the constitution and wrote the Bill of Rights. I think that they were just as conscious of the necessity of winning wars as we are today. Moreover, I think that they had actual experience in winning one, and saw the necessity for preserving the rights which they delineated in the Constitution and the Bill of Rights, and the capacity to win wars without destroying those rights.

I think that the OPA has no right, either in a civil case or a criminal case,—that is to say, in anticipation of either one or the other—to go into a man's place of business, or his home, and there examine or take from his records of his business or his personal records. In granting this motion to suppress the evidence we are not cutting the hands of the OPA off from enforcing the law. They can still enforce the law. They can enforce it in the way that Congress said they could enforce it. They can get the evidence by subpoena. They can get it in the way that every other case has to be prosecuted by the Government when it is prosecuted under the terms and limits of the Constitution. So that in making this ruling there is no striking down of the OPA, or the efforts of the Government to prevent inflation, nor the declared policy of Congress.

On the contrary, it is my belief that I am carrying out the express will of Congress and the determination of the whole people that the rights which are part of our liberties and freedoms shall be preserved against any and every agency of the Government.

The motion to dismiss is granted.

With particular relation to this matter, I would like to have had the time to extend my reasons. However, in reading the statute I get a different notion of Paragraph (e) than apparently either the Government or the defendant. That is, Paragraph 205(e). And in granting this motion to dismiss, I am not, again cutting the hands of the Government off, because the way I view the Act the suit can still be brought for treble damages or for thrice the amount, whatever it is, in the appropriate case.

So, in my view of the construction of the law, I must grant the motion to dismiss, which will, also sustain the defendants' contention that the provision of the law is so incapable of clarity or so lacking in clarity that an ordinary and reasonable person cannot determine what is meant by it.

And in that connection, while this is remedial, so far as the Government is concerned, I cannot, again escape the conclusion that it is certainly penal as far as the defendant (6) is concerned from whom the Government attempts or expects to collect three times the amount of any overcharge which might have been made. And it being penal in its nature, it is a suit which is prosecuted.

The word 'prosecute' doesn't mean a criminal case alone. In fact, the statute which prescribes the duties of the United States District Attorney says

that he shall prosecute all delinquents and all civil actions.

So a civil action is prosecuted as well as a criminal action. And throughout the decisions and the opinions you will find the use of the phrase that a statute which is incapable of a clear and reasonable definition shall not support a prosecution.

Going now to the other phase in my construction of this statute. I thank the Government for submitting to me the Senate Report. First of all, I will read the statute, so that my opinion will be, perhaps, a little clearer. Section 205(e). And this is the statute upon which this action is brought:

'If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50.00 or for treble the amount by which the consideration exceeded the applicable maximum (7) price, whichever is the greater, plus reasonable attorney's fees,' and so forth.

Skipping a sentence.

'If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection * * *.'

'The difficulty there arises whether or not the phrase 'other than in the course of trade or business' is a limitation upon or clarification of the phrase 'for use or consumption' or clarification of the word 'buys.' So, 'if any person selling a commodity vio-

lates a regulation, the person who buys it, other than in the course of trade or business,' is the way, it seems to me, the statute should read; whereas the Administrator says the person who buys it for use in his trade or business. Which would make it applicable—that is, permit the Administrator to bring actions against wholesalers.

In my view of that Act, this was intended to permit the Administrator to bring actions against the bootleggers. That is to say, if a person buys a commodity in the course of trade or business—then the one who gets stuck for it, moving into the grocery store for that excess price, he can bring an action for three times the price. But if a bootlegger takes butter around, or whiskey, or wine, or eggs, or any one of the (8) commodities which are now being trafficked with illegally, and he sells it then I don't think that the buyer of it can bring an action for three times the price, but I think it is the duty of the Administrator to then bring that action for treble the price against the illegitimate dealer. That is, the person who has sold it other than in the course of trade or business, because it can't be said a bootlegger acts in the course of trade or business.

And for that reason not only the Bee Ray action must fall, but also the Glick action, because it is alleged that none of the purchases were made for use or consumption other than in the course of trade or business. In other words, they were made for use or consumption in the course of trade or business, as I read the complaint.

Is that not the intention of the allegation?

Mr. Breitenbach: I assume that is true, Your Honor.

The Court: Thus, again, I wish to emphasize that the Administrator's hands are not cut off from enforcing the law, and there is left to the Administrator, against the man who is engaged as a legitimate dealer in the course of trade or business the criminal sanctions against the act. He has the licenses which he can revoke by calling him in, he has every other sanction, and apparently Congress in addition to plugging all the holes for the legitimate dealer might have put this provision in in order that the Administrator might be able to reach every class of persons who might vio- (9) late the law, because he can't take a license away from a bootlegger because he hasn't got any."

On appeal before the Ninth Circuit Court of Appeals, the Government, which was the appellant, there urged the Circuit Court to reverse both the judgment of dismissal and the interlocutory order granting the motion to suppress the evidence. It argued that regardless of the fact that the investigators went out on an exploratory investigation without any process or pretended process, that it had a right to go through the private files of the petitioners and make any search it wished and take the records it desired to the O. P. A. office and photostat them and bring them back on the theory that these records were quasi-public records required by law to be kept by the petitioners. But there is nothing in the records that show that these documents were quasi-public records or that they were the documents or records to be kept nor that the statute authorized such an exploratory search.

III.

Points Upon Which the Petitioner Relies.

1. The Circuit Court erred in reversing the judgment of the District Court. The District Court acted correctly in dismissing the complaint.

(a) The complaint failed to state a claim upon which relief could be granted.

(b) The complaint was based upon information illegally searched and seized.

(c) The statute upon which the complaint is based is so vague and indefinite as to fail to form a standard of penal conduct and therefore violates the Fifth Amendment to the Constitution of the United States.

(d) The complaint is indefinite and uncertain and fails to state any facts upon which the Court can determine that it has any jurisdiction.

(e) The information upon which the complaint is based was gathered in violation of the Fourth and Fifth Amendments to the Constitution of the United States and it was therefore unlawful to base a complaint thereon.

2. The Circuit Court erred in reversing the interlocutory order of the District Court in suppressing the evidence. The District Court acted within its jurisdiction and powers in suppressing the evidence.

(a) The evidence was secured through unlawful search and seizure and in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

(b) The order, being interlocutory, the Circuit Court had no jurisdiction to reverse the order. It was not an appealable order.

3. The Circuit Court erred in refusing to dismiss the action following the expiration of the Emergency Price Control Act of 1942. The expiration of the Act terminated the action, and the amendments did not infuse life into the dead statute insofar as it was applicable to this case.

IV.

Questions Raised by This Appeal.

1. Are officers or agents of the Government entitled to go through the private files and records of any corporation or person without any process, pretended process, search warrant, or otherwise, and remove such papers as they see fit and take them to the Office of Price Administration for photostating, or do the Fourth and Fifth Amendments necessarily constitute a part of every statute and every process and proceeding by officers and agents of the Government?

2. If an action is labelled a civil action by the Government, does it remove the necessity for a search warrant, *subpoena duces tecum*, or other lawful process in order to entitle the investigators to make their search?

3. Do the Fourth and Fifth Amendments apply to civil actions?

4. Where the trial court makes a finding of fact and suppresses evidence as having been unlawfully searched and seized, may the Circuit Court reverse the findings of the District Court where those findings are based on substantial evidence?

5. Where the statute involved the meaning of the phrase "in the course of trade or business" is vague, indefinite and uncertain and the District Court passes on the

question but the Circuit Court declines to pass on it, either on the hearing or on the petition for rehearing, should not the Supreme Court take the matter over for the purpose of determining the validity or invalidity of the statute on this question, where the definition has been highly uncertain and has been the subject of numerous and conflicting District Court decisions on its meaning?

6. Do the new rules of civil procedure require that the constitutional guarantees be read into and be a part of them?

7. Is a person entitled, in a complaint for a penalty, to be informed of the nature and cause of the penalty in such plain and simple language as to constitute a full and simple statement of that of which he is charged?

8. Is a complaint which states sheer conclusions a sufficient compliance with the requirements that a person facing a penalty be informed of what he has to meet?

9. Where the Administrator alleges a violation of the statute as the basis of his complaint, must he not specify exactly each purported violation in separate and distinct allegations?

10. Can he lump all of the items alleged without informing the accused of each item?

11. Where there has been an amendment to the Emergency Price Control Act of 1942 changing the form and character of the penalty, where there is no willfulness, does a complaint which does not allege willfulness state a cause of action for treble damages?

12. Under what circumstances was the Administrator given the right of action and was he given the right of action under the circumstances given in this case?

Reasons for Granting This Writ

1. The questions raised in this case are new and extremely important to the nation as a whole and to the rights of individuals under the Fourth and Fifth Amendment to the Constitution.

The preserving of the Bill of Rights at home is equal to winning of the war abroad.

2. Interpretations of the meaning of certain phrases in the Emergency Price Control Act never heretofore determined are involved in this appeal.

3. The question as to whether all records kept by business men become *quasi-public records* because of the Emergency Price Control Act is involved in this appeal and also the question as to whether such a statute, by reason of its inquisitorial character, inherently and as construed and applied by the Circuit Court offends the Fourth and Fifth Amendment to the Constitution of the United States are involved.

4. More letters and inquiries for the record and decision have come into the District Court Clerk's Office from all over the country in connection with this case than any other case decided by the District Court in California in many years and countless inquiries have come into counsel for the appellant from all over the country.

5. There is a conflict in interpretation of the phrase "in the course of trade or business" as contained in the Emergency Price Control Act between the District Courts of the United States, and the decision by this Court is necessary in order to establish uniformity of opinion in important questions involved throughout the country.

6. The rights of individuals and corporations under the Fourth and Fifth Amendments to the Constitution of the United States in war time is also involved in this decision.

7. It is also important to determine whether the constitutional provisions as to notice and an opportunity to defend applies to the rules of civil procedure where a penal action is brought in the form of a civil action and whether the constitutional guarantees are written into and a part of every civil action under the new rules of civil procedure.

Questions Presented by This Appeal.

1. Do the provisions of the Fourth and Fifth Amendment against unreasonable search and seizure apply to civil actions seeking a penalty?

2. Is a complaint under the Emergency Price Control Act, which alleges in a mere general statement that there have been violations of the Act without any specifications sufficient to constitute a complaint for a series of penalties under the Emergency Price Control Act? Must such complaint contain a plain and simple statement *of facts* showing that the court has jurisdiction?

3. Can such a complaint be lumped into one or two or three causes of action?

4. Is there any reasonable relationship between the congressional intent and the use to which the treble damage action is being put by the Office of Price Administration?

5. Can they be based upon a seizure of a business man's papers, documents and records from his place of business without his consent and without any process of pretended process of any kind or character?

6. What is the meaning of the phrase "in the course of trade or business" and is the meaning of this phrase without a definition by Congress so vague, indefinite and uncertain as to invalidate the Penal Statute for indefiniteness under the Fifth Amendment to the Constitution of the United States?

7. Do the constitutional guarantees against unreasonable search and seizure make the provisions of the Emergency Price Control Act permitting such search and seizure unconstitutional as such provisions are now construed and interpreted by the Circuit Court of Appeals.

8. May the Administrator, by reason of his being a government officer, cause his agents to seize evidence for a civil action without any lawful process or pretended process, where a private litigant would be unable to do so?

9. Has the Administrator lost his right of action where the Emergency Price Control Act has been amended to provide that no treble penalty action lies where there is no willfulness and willfulness has not been alleged in the original complaint. Does such a change in the Statute require the dismissal of the complaint?

Opinions of Court Below.

V.

Previous Opinions of the Courts Below Are Contained in Bowles v. Glick Bros. Lumber Company, 52 Fed. Supp. 913, and Bowles v. Glick Bros. Lumber Company, 146 Fed. (2d) 566.

While upholding the constitutionality of the Emergency Price Control Act, the District Court nevertheless held that it did not state a claim in this type of case because the right to sue for treble damages was meant to give the Administrator a cause of action against the bootlegger who could not be reached otherwise. The Act was never designed to give the Office of Price Administration the right to sue for large sums of money as a penalty in the manner herein attempted.

It further held that the complaint failed to state a claim for which relief could be granted, since it did not specify a *claim* in plain language.

The Circuit Court reversed. The petitioner raised points regarding the unconstitutionality and uncertainty of the statute as well as the complaint. The Circuit Court did not pass on these questions though raised and argued by the petitioner, appellee below.

VI.

Cases Believed to Sustain Jurisdiction, and Cases and Situations Relied On.

Emergency Price Contral Act of 1942, Chapter 26, 56 Stats. 23, Sec. 901, and amendments thereto; Sec. 1, 56 Stat. 23, as amended Oct. 2, 1942, c. 578, Sec. 7(a), 56 Stat. 767; June 30, 1944, c. 325, Title I, Sec. 101, 58 Stat. 632; Title 28, Sec. 347, U. S. Codes;

Davies Warehouse Company v. Bowles, 88 L. Ed. 379;

Hecht v. Bowles, 88 L. Ed. 465;

Bowles v. Willingham, 88 L. Ed. 626, October Term, 1943, No. 464;

Yakus v. United States, 88 L. Ed. 653, October term, 1943, No. 374-5;

Bowles v. Seminole Rock & Gravel Company, 89 L. Ed. 687, October term, 1944, No. 914.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1944

No. .....

GLICK BROTHERS LUMBER COMPANY, a California Corporation, MAX GLICK, OSCAR GLICK, ADOLPH GLICK, DAVID GLICK, ISRAEL GLICK and LABEL GLICK and doing business as Glick Brothers Lumber Company,

Petitioners,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

The Exploratory Searches and Seizures by the Office of Price Administration Without Process or Pretended Process and Over Objections Violated Petitioners' Rights Under the Fourth and Fifth Amendments to the Constitution of the United States.

Upon the basis of the evidence before it of the exploratory search of two investigating officers without any complaint or pretended complaint, neither they nor anyone connected with the Government had a right to seize any papers from the private vaults of the defendants and clandestinely take them to the Office of Price Administration

for photostating. It is respectfully submitted that this search and seizure was illegal. The Fourth and Fifth Amendments cover not only searches but seizures.

Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746;

Takahashi v. United States, 143 Fed. (2d) 118.

The constitutional guarantees of the Fourth Amendment apply equally to corporations. Explanatory searches are unauthorized.

Go-Bart Importing Company v. United States, 282 U. S. 374, 75 L. Ed. 344;

Guckenheimer & Bros. Co. v. United States, 3 Fed. (2d) 786;

Nathanson v. United States, 290 U. S. 41, 78 L. Ed. 159;

Silverthorne Lumber Co. v. United States, 254 U. S. 385-390, 64 L. Ed. 319;

Hale v. Henkel, 201 U. S. 43, 50 L. Ed. 652.

Both searches and seizures of individual papers are forbidden.

Weeks v. United States, 232 U. S. 383.

In *Goldman v. United States,* 86 L. Ed. 1330, there is the following footnote:

"4. Papers taken from an office in the course of an unreasonable search are taken in violation of the Fourth Amendment. Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. Ed. 319, 40 S. Ct. 182, 24 ALR 1426; Gouled v. United States, 255 U. S. 298; 65 L. Ed. 647, 41 S. Ct. 261; Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L.

Ed. 374, 51 S. Ct. 153; United States v. Lefkowitz, 285 U. S. 452, 76 L. Ed. 877, 52 S. Ct. 420, 82 ALR 775."

At page 1328:

"Mr. Justice Murphy says:

"One of the great boons secured to the inhabitants of this country by the Bill of Rights is the right of personal privacy guaranteed by the Fourth Amendment. In numerous ways the law protects the individual against unwarranted intrusions by others into his private affairs."

At page 1329:

"But the Fourth Amendment puts a restraint on the arm of the Government itself and prevents it from invading the sanctity of a man's home or his private quarters in a chase for a suspect except under safeguards calculated to prevent oppression and abuse of authority.

On the value of the right to privacy, as dear as any to free men, little can nor need be added to what was said in Entick v. Carrington, 19 How. St. Tr. (Eng.) 1030, Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 S. Ct. 524, and Justice Brandeis' memorable dissent in Olmstead v. United States, 277 U. S. 438, 471, 72 L. Ed. 944, 953, 48 S. Ct. 564, 66 ALR 376. Suffice it to say that the spiritual freedom of the individual depends in no small measure upon the preservation of that right. Insistence on its retention does not mean that a person has anything to conceal, but means rather that the choice should be his as to what he wishes to reveal, saving only to the Government the right to seek out crime under a procedure with suitable safeguards for the

protection of individual rights, such as the warrant whose requisites are set forth in the Fourth Amendment."

In *Federal Trade Com. v. American Tobacco Co.*, 264 U. S. 306, 68 L. Ed. 700, 701, it was held as follows:

> **"Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."**

In *Feldman v. United States,* decided May 29, 1944, No. 193 October Term, 1943, the court said:

> *"We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases of the same constitutional purpose, to maintain inviolate large areas of personal privacy. . . .*
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> *"But for more than one hundred years, ever since Barron v. Baltimore,* 7 Pet. 243, *one of the settled principles of our Constitution has been that these Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit. Brown v. Walker,* 161 U. S. 591, 606; *Jack v. Kansas,* 199 U. S. 372, 380; *Twining v. New Jersey,* 211 U. S. 78. . . .
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> *"The Constitution prohibits an invasion of privacy only in proceedings over which the Government has control."*

Mr. Justice Black, in his dissenting opinion, said:

"In *Boyd v. United States*, this Court said that 'any compulsory discovery by extorting the party's oath . . . is contrary to the principles of a free government. It is abhorrent . . . to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.' 116 U. S. 616, 631-632. Unless the Court is now disavowing this belief, the use of testimony obtained by compulsory discovery to convict an accused must be considered 'shocking to the universal sense of justice' and 'offensive to the common and fundamental ideas of fairness and right,' and therefore, under past decisions of the Court, incompatible with Constitutional due process of law. *Betts v. Grady*, 316 U. S. 455, 462, 473. Or at least, even if the use of testimony extracted by compulsory discovery be held consistent with due process, adherence to the belief expressed by the *Boyd* case should require the Court to hold that, absent a conflicting Act of Congress, 'a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence' so obtained. *McNabb v. United States*, 318 U. S. 332, 347. But I do not base my dissent upon judicially defined concepts of procedural due process or upon judge-made rules of evidence. . . .

"As the Fifth Amendment heretofore has been interpreted, Feldman's testimony could not have been used for this purpose had it been compelled by a fed-

eral court rather than the state court.[1] This would have been true whether the federal court proceeding had been non-criminal or criminal,[2] and whether Feldman had testified as a mere witness or as a defendant."[3]

Statutes providing for such searches are violation of the Fourth and Fifth Amendment.

Boyd v. United States, 116 U. S. 616.

There is nothing in the Congressional history or in the Act itself that shows any intent to evade or avoid or prevent the constitutional guaranty. On the contrary, the presumption is that Congress intended that the Constitution should be followed in all its provisions as a part of the Act. The Congress clearly indicated this intention in providing for the power of subpoena and *lawful process* for the purpose of securing books, papers, and records. It provided for a constitutional guaranty of claiming the privilege in respect to any investigation. Such claim of privilege necessarily connoted that there be process of subpoena and an opportunity to claim the privilege—an opportunity which is non-existent if officers without any process or pretended process can, on a roving commission, seize any books or papers they may select, fail to give any receipt for them, take them to the Office of the Office of Price Administration, or keep them

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[1]*McCarthy v. Arndstein,* 266 U. S. 34; and see *Bram v. United States,* 168 U. S. 532; *Wan v. United States,* 266 U. S. 1; *cf. Boyd v. United States,* 116 U. S. 616.

[2]*McCarthy v. Arndstein, supra,* Note 2, pp. 40-41; *Counselman v. Hitchcock,* 142 U. S. 547, 562. See also *United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149; *United States ex rel. Vajtauer v. Comm'r. of Immigation,* 273 U. S. 103.

[3]*Counselman v. Hitchcock,* 142 U. S. 547.

or return them, as they see fit. Surely this was not the purpose of Congress.

The Congress also showed its clear intent in providing in the Act for the right of counsel and for an opportunity to have the statements of any witnesses taken down by a shorthand reporter. The Congressional history is further implemented by:

(a) An investigation of the Select Committee to investigate Executive Agencies, House of Representatives, 78th Congress, 2nd Session, appointed pursuant to House Resolution 102 to investigate Executive Agencies.

(b) House of Representatives Report No. 102, Part 3, dated June 1, 22nd, 1944 to investigate executive agencies, where Attorney Fleming J. James, Jr., Chief Government Officer for the Office of Price Administration, who appeared before this Court, and the Select Committee to Investigate Executive Agencies.[1] Congress questioned

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[1]This court's attention is respectfully called to the testimony given by Attorney Fleming James, Jr., Chief Enforcement Counsel for the Office of Price Administration, before the congressional investigating committee of executive agencies. Mr. James was asked why the O.P.A. was sending out subpoenas in blank and the authority of the O.P.A. to do so.

Nowhere in his testimony before Congress did James contend that the records sought by the O.P.A. were quasi-public, and that subpoenas or process were unnecessary, which would have been a complete defense to the questioning by Congress, for if records are quasi-public no subpoenas would in fact be necessary and none would have to be sent out to the different departments throughout the country in blank. Mr. James conceded that the O.P.A. could get things from the courts which Congress would not give to them.

In House of Representatives Report 102, Part 3, June 1, 22, 1944, to investigate executive agencies, Mr. James said:

> "You never can tell what will happen if you put the thing directly up to Congress, I suppose. (P. 2435.) . . . So far as the wisdom of a course of action is concerned, a situation may very well arise where you have language that you

Mr. James as to why the Office of Price Administration was sending out subpoenaes in blank and the authority of the Office of Price Administration to do so. Nowhere

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feel supports what you are doing and which was intended that way at the time when it was enacted, and that you feel you might get an entirely different result at a later time when the temper of things is changed.

Mr. Ford: What do you mean 'temper of things'?

Mr. James: If the attitude of Congress toward the agency changed, or something like that. That isn't a thing considered in this case.

Mr. Ford: What you really mean is the temper of the courts, don't you?

Mr. James: No; I didn't mean that, sir.

Mr. Ford: You didn't?

Mr. James: No.

Mr. Ford: I didn't exactly understand what you meant.

Mr. James: What I meant was simply that if you asked for a clarifying amendment later, you might not get it even though Congress would have originally enacted it at the time it was passed."

He further conceded that the subpoena would have to be limited and would have to specify the books and papers pertinent and necessary.

"Mr. Hartley: Just how broad is this authority? Will you state for the record exactly what authority this is to these local administrators all over the United States? How far-reaching is that authority? What can they do under it?

Mr. James: They can do just what the Administrator did before. That is, the facts must be laid before them as to why a subpoena is sought and the terms of the subpoena are laid before them and they determine whether in their discretion a subpoena should issue, and if they determine that it should, they sign and issue it.

Mr. Hartley: And how broad would the subpoena be?

Mr. James: The subpoena has to be specific. That is the requirement.

Mr. Hartley: What may it include?

Mr. James: Well, it may include papers, books, and invoices relating to certain specific transactions between certain specific dates.

"Well, it is hard to answer the questions in the abstract." (P. 2432.)

in his testimony before Congress did Mr. James contend that the records sought by the Office of Price Administration were *quasi*-public, which would have been a com-

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Mr. James: Yes; I think the Administrator has the legal authority to delegate it to him, but this is true: The subpoena power has been very carefully preserved in the administrative part of the agency and not given to the enforcement part of the agency. As I say, there has been no essential change. This order works no essential change, and that is why I didn't give it the serious consideration that I perhaps should have as to the various ways of doing it.

There certainly isn't any tradition or any predisposition to grant the subpoena power to the enforcement side of the agency, and I know that it won't be done.

Mr. Hartley: But in your interpretation of the act, and if this authority is correct, Mr. Bowles would have the authority to let Mr. Polier issue subpoenas?

Mr. James: Yes; he has the authority to make what would be an unwise delegation, to be sure, just as that would be true under the delegation of any of his powers.

Mr. Hartley: I am glad you agree it would be an unwise delegation of authority.

Mr. James: I think it would be unwise only because I think it would be unwise to delegate the subpoena power to the Enforcement Department, to me, or to Mr. Emerson. I think it should be in the administrative side.

Mr. Hartley: Have you completely explained the extent to which the subpoena power can be used? Are you satisfied that you have?

Mr. James: Well, I think so, unless you have some specific question.

Mr. Hartley: I asked you to explain how broad this authority was in your opinion.

Mr. James: Yes.

Mr. Hartley: And I am asking you whether or not you have explained that for the record.

Mr. James: Well, I think so. The requirement is that a subpoena must be specific. It must contain a specific description of what is desired. The way that is usually made specific is that it described documents pertaining to certain named transactions, or with certain named people between certain given dates. That is the practice generally in connection with the subpoenas.

Mr. Hartley: Could it force a person to bring in his bankbooks?

plete defense to the questioning of Congress, for if records were *quasi*-public no subpoena would in fact be necessary and none would have to be sent to the different officers of the Office of Price Administration throughout the country in blank. Mr. James stated that the Office of Price Administration could get things from the Court which Congress would not give them.[2]

The Ninth Circuit Court of Appeals took the position that the Emergency Price Control Act, being a wartime measure, that its construction should be placed in a dif-

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Mr. James: Yes; I think so.

Mr. Harltey: His savings accounts?

Mr. James: You mean the records of his savings accounts?

Mr. Hartley: Yes; I mean his bank book which shows how much money he has in the bank and his checking account.

Mr. James: Yes; I think it could.

Now, of course, this subpoena, like any other subpoena, is subject to privilege, and if a man claims privilege, then if he still is compelled to testify, immunity is thereby granted to him from any criminal or penal liability arising out of the transactions about which he testifies. That is a fairly usual procedure." [Pp. 2437, 2438.)

This, of course, would be entirely unnecessary if records were quasi-public.

It follows that the contention here made in this court was never made to Congress. The investigation of the congressional committee was climaxed into the Act as amended, which not only re-emphasized the subpoena requirement, but also gave the person subpoenaed the right to have counsel and to have the testimony taken down.

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[2]It is respectfully submitted that it is for the District Court to find the facts in the case and not for the Circuit Court of Appeals to make different findings if the facts as found by the District Court are supported by circumstantial evidence.

ferent light and upon a different basis. However, this Court has said in several cases that

> "The Constitution of the United States is a law for rules and people, equally, in war and in peace."
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> *Ex Parte Milligan,* 4 Wall. 2, 120;
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> *Ex Parte Endo,* 89 L. Ed. 219;
>
> *Thomas v. Collins,* 89 L. Ed. 340.

Never before in the history of the United States do we know of any litigant, either the Government or other litigants, being able to search and seize a person's place of business for the purpose of suing him civilly. Surely no private litigant, having the right to sue for treble damages, could go into a store and grab records for the purpose of bringing this type of action. Has the Government any more rights than private litigants for bringing the action under the O. P. A. law, and can the Government officers, by reason of their official position, do what private litigants can not do? The question calls for serious and sober reflection and reconsideration.

This Court has stated in its opinion that:

> "Nor in a civil action does illegality of the means by which evidence has been procured afford grounds for a Motion to Dismiss. The defenses which may be interposed by motion are confined to those enumerated in Rule 12-B."

This Court has evidently overlooked the fact that the civil action in form, it is penal in nature. Therefore, no matter how the cause of action might be disguised, or what terminology may be applied to it, whether civil, penal, criminal, or otherwise, the guarantees of the Fourth Amendment are equally applicable.

This Court has vidently overlooked the fact that the case of *Boyd v. United States,* 29 L. Ed. 746, was a civil case in which there was a suit to forfeit 35 cases of plate glass. The Court in its analysis of that case said:

> "It is our opinion therefore that a compulsory production of a man's private papers to establish a criminal charge against him, *or to forfeit his property,* is without the scope of the Fourth Amendment to the Constitution, in all cases which a search and seizure would be."

And the Court further said:

> "Now it is elementary knowledge that one cardinal rule of the Court of Chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power, but it cannot abide the pure atmosphere of political liberty and freedom."

The Court further points out:

> "Reverting then to the peculiar phraseology of this Act and to the information in the present case, which is founded on it, we have to deal with an Act which expressly excluded criminal proceedings from its operation, although embracing civil suits for penalties and forfeitures, and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings of the law from being obnoxious to the prohibitions

of either? We think not; we think they are within the spirit of both."

That the Fourth Amendment applies equally to actions civil in form, though penal in nature, has been decided a long time ago, (*Boyd v. United States*, 29 L. Ed. 746), and that it applies in civil actions has equally been decided. (*Rogers v. United States*, 97 Fed. (2d) 691.) In adopting the new rules of civil procedure, Congress did not intend and can not be presumed to have intended to eliminate the constitutional guarantees which are substantive rights of litigants.

The District Court acted correctly within its authority in suppressing the evidence and ordering its return. This is a power inherent in the District Court which has a control of its own officers and papers. (*Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652-7; *Go-Bart Importing Company v. United States*, 282 U. S. 374, 75 L. Ed. 344.)[3]

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[3]In *Go-Bart Importing Company v. United States*, the Court said:

"The United States attorney and the special agent in charge, as officers authorized to conduct such prosecution and having control and custody of the papers for that purpose are, in respect of the acts relating to such prosecution, alike subject to the proper exertion of the disciplinary powers of the court. And on the facts here shown it is plain that the district court had jurisdiction summarily to determine whether the evidence should be suppressed and the papers returned to the petitioners. Weeks v. United States, 232 U. S. 383, 398, 58 L. ed. 652, 657, L. R. A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177; Wise v. Henkel, 220 U. S. 556, 558, 55 L. ed. 581, 582, 31 S. Ct. 599; Silverthorne Lumber Co. v. United States, 254 U. S. 385, 390, 64 L. ed. 319, 321, 24 A. L. R. 1426, 40 S. Ct. 182; Cogen v. United States, 278 U. S. 221, 225, 73 L. ed. 275, 281, 49 S. Ct. 118; United States v. Mills (C. C.), 185 Fed. 318; United States v. McHie (D. C.), 194 Fed. 894, 898; United States v. Lydecker (D. C.), 275 Fed. 976, 980; United States v. Kraus (D. C.), 270 Fed. 578, 580. Cf. Applybe v. United States (C. C. A. 9th), 32 F. (2d) 874."

In *Jones v. Securities and Exchange Commission*, 298 U. S. 25, 26, 80 L. Ed. 1026, the Court said:

> "* * * Disassociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as 'a fishing expedition . . . for the chance that something discreditable might turn up.' (Ellis v. Interstate Commerce Commission, 237 U. S. 434, 445, 59 L. ed. 1036, 1041, 35 S. Ct. 645)—an undertaking which uniformly has met with judicial condemnation. *Re* Pacific R. Commission (C. C.), 12 Sawy. 559, 32 F. 241, 250; Kilbourn v. Thompson, 103 U. S. 168, 190, 192, 193, 195, 196, 26 L. ed. 377, 386-389; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 520; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 419, 53 L. ed. 253, 263, 29 S. Ct. 115; Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 305-307, 68 L. ed. 696, 700, 701, 44 S. Ct. 336, 32 A. L. R. 786.
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> "*Re* Pacific R. Commission involved the power of a congressional commission to investigate the private affairs, books and papers of officers and employees of certain corporations indebted to the government. That commission called before it the president of one of these corporations, required the production of private books and papers for inspection, and submitted interrogatories which the witness declined to answer. Acting under the statute, the commission sought a peremptory order from the circuit court to compel the witness to answer the interrogatories. The court, consisting of Mr. Justice Field, Circuit Judge Sawyer, and District Judge Sabin, denied the motion of the district attorney for the order and discharged the rule to show cause. Opinions were ren-

dered seriatim, the principal one by Justice Field. The authority of the commission was definitely denied. That decision has frequently been cited and approved by the court. Judge Sawyer, in the course of his opinion (at p. 263), after observing that a bill in equity seeking a discovery upon general, loose and vague allegations is styled 'a fishing bill,' and will, at once, be dismissed on that ground (Story, Eq. Pl., sec. 325), said: 'A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no resrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end.'

"The fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious. And, indeed, the fear itself has little of substance upon which to rest. The federal courts are open to the government; and the grand jury abides as the appropriate constitutional medium for the preliminary investigation of crime and the presentment of the accused for trial.

"The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its in-

ception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing to light. *Cf.* Byars v. United States, 273 U. S. 28, 29, 71 L. ed. 520, 522, 47 S. Ct. 248, and cases cited. If the action here of the commission be upheld, it follows that production and inspection may be enforced not only of books and private papers of the guilty, but those of the innocent as well, notwithstanding the proceeding for registration, so far as the power of the commission is concerned, has been brought to an end by the complete and legal withdrawal of the registration statement.

"Exercise of 'such a power would be more pernicious to the innocent than useful to the public,' and approval of it must be denied, if there were no other reason for denial, because, like an unlawful search for evidence, it falls upon the innocent as well as upon the guilty and unjustly confounds the two. Entick v. Carrington, 19 How. St. Tr. 1030, 1074—followed by this court in Boyd v. United States, 116 U. S. 616, 629, 630, 29 L. ed. 746, 747, 751, 6 S. Ct. 522. No one can read these two great opinions and the opinions in the Pacific R. Commission Case, from which the foregoing quotation is made, without perceiving how closely allied in principle are the three protective rights of the individual—that against compulsory self-accusation, that against unlawful searches and seizures, and that against unlawful inquisitorial investigations. They were among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640. Even the shortest step in the direction of curtailing one of these rights must be halted *in limine*, lest it serve as a precedent for further advances in the same direction or for wrongful invasions of the others."

The following cases are helpful:

U. S. v. Mounday, 208 F. 186;

U. S. v. Friedberg, 253 F. 313.

In *U. S. v. Premium & Butte,* 246 F. 185, the court said with reference to the Fourth and Fifth Amendments:

> "These constitutional provisions were designed to check great evils well known to the founders of this republic. They are as valuable and necessary in war as in peace, and to be respected in both. They are principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle. The duty of giving them 'force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws.'"

See, also:

U. S. v. Olmstead, 7 F. (2d) 760, 762;

U. S. v. 1013 Crates of Whiskey Bottles, 52 F. (2d) 49.

In the case of *Hale v. Henkel,* 201 U. S. 43, 50 L. Ed. 652, the court held that the Fourth Amendment applies to a subpoena *duces tecum* issued under an order of the court, where the subpoena is so broad as to constitute an unreasonable search or inquiry, and that this applies to corporations as well as individuals. This was repeated in the *Boyd* case.

There is no reason why a complaint for a penalty by the United States, based upon evidence unlawfully searched and seized, in violation of the Fourth and Fifth Amendments to the Constitution of the United States, should not be suppressed, no matter what the name of

the action might be. Any other holding would defy the principles of the Fourth and Fifth Amendments.[4]

In the case of *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, 657, the court held that upon a timely motion to suppress evidence secured in violation of the Fourth Amendment the motion should be granted.

Where, as here, the entire proceedings were based upon this unlawful search and seizure, the court was not only obliged to examine the facts and determine the same, but was obliged, upon finding the grounds to be supported by substantial evidence, to grant the motion to dismiss.

In the *Weeks* case, the court said:

> " 'While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd Case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum*, against which the person, be he individual or corporation, is entitled to protection.' If such a seizure under the authority of a warrant supposed to be legal, constitutes a violation of the constitutional protection, *a fortiori* does the attempt of an officer of the United States, the United States marshal, acting under color of his office, without even the sanction of a warrant, constitute an invasion by the 4th Amendment. . . .
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> "The right of the court to deal with papers and documents in the possession of the district attorney

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[4]Actually there need be no case of any kind pending. Application may be made to suppress the evidence and return the same without it. See *Cogen v. U. S.*, 278 U. S. 221, 73 L. Ed. 275; *Go-Bart Importing Co. v. U. S.*, 282 U. S. 374, 75 L. Ed. 344.

and other officers of the court, and subject to its authority, was recognized in Wise v. Henkel, 220 U. S. 556, 55 L. ed. 581, 31 Sup. Ct. Rep. 599. That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts. 1 Bishop, Crim. Proc., sec. 210; Rex v. Barnett, 3 Car. & P. 600; Rex v. Kinsey, 7 Car. & P. 447; United States v. Mills, 185 Fed. 318; United States v. McHie, 104 Fed. 894, 898.

"We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused."

While the *Weeks* case was a criminal case, the procedure as set forth clearly shows that the court, having control of the papers and things, has the duty to suppress the evidence unlawfully secured in violation of the Fourth Amendment and return the same, regardless of whether they were secured by a search warrant, a subpoena *duces tecum*, or without any process or pretended process, by officers of the United States.

In *Hale v. Henkel*, 201 U. S. 43, 50 L. Ed. 652, the court held that a subpoena *duces tecum* requiring a corporation to produce all its contracts and correspondence was unreasonable under the Fourth Amendment to the Constitution of the United States.

In *Go-Bart Importing Co. v. United States*, 282 U. S. 374, 75 L. Ed. 344, the United States Supreme Court held that a District Court of the United States has jurisdiction summarily to determine whether evidence should be suppressesd and papers returned. In that case there was a general exploratory search of the premises and the seizure of papers therefrom. The court pointed out that "the company is not mentioned in the complaint or warrant and is a stranger to the proceeding before the commissioner." The court there said:

> "There remains for consideration the question whether the search of the premises, the seizure of the papers therefrom and their retention for use as evidence may be sustained. The first clause of the 4th Amendment declares: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.' It is general and forbids every search that is unreasonable; it protects all those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken. Gouled v. United States, 256 U. S. 298, 307, 65 L. ed. 647, 651, 41 S. Ct. 261. The second clause declares, 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state

in the Union. Agnello v. United States, 269 U. S. 20, 33, 70 L. ed. 145, 149, 51 A. L. R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigiliance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. Boyd v. United States, 116 U. S. 616, 623, 29 L. ed. 746, 748, 6 S. Ct. 524; Weeks v. United States, 232 U. S. 389-392, 58 L. ed. 654, 655, L. R. A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177, *supra*."

As in the *Go-Bart* case, so here, there was a general, exploratory search, and as in that case, by pretension of right and threat of force, the investigators compelled the early inspection which they made of invoices for the months of October, 1942, and April, 1943. In the *Go-Bart* case, page 357, the court said,

> "By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 306, 68 L. ed. 696, 700, 32 A. L. R. 786, 44 S. Ct. 336."

This was like the *Glick Brothers* case, where the officers under their own claim of pretended authority or pretension of right, and threat that it would go "awfully tough" commenced ransacking the private files and records of the Glick Brothers and taking them out of the office each

night and taking them to the Office of Price Administration for surreptitious photostating.[5]

That Congress, under the Emergency Price Control Act of 1942, clearly intended all of the constitutional safeguards to be observed is shown by the fact that provisions were made in the section under "Administration and Enforcement" (sections 921, 922) to issue subpoenas, and "in case of contumacy by or refusal to obey a subpoena served upon any person referred to in subsection (c) the District Court in any district in which such person is found or resides, or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony and to appear and produce documents, or both, and any failure to obey such order of the court may be punished by the court as contempt thereof."

Thus Congress has not vested authority in the Administrator to punish for a violation of his subpoena, but has given the Administrator the right and power of subpoenaing with the enforcement of the same lodged in the courts.

Not even in the vortex of war power has Congress eliminated the necessity of lawful process in the securing of information. In the first War Powers Act of 1941, Title 50, U. S. C. A., Section 601, only the President was authorized to subpoena persons, etc., and in the Second War Powers Act of 1942, Title 50, App. Section 643, inspection and audit of war contracts is given by Congress; but by executive order No. 9127 of April 10, 1942, 7 F. R. 2753, even the authority to inspect war plants, to administer oaths or to issue subpoenas for the attendance

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[5]Mr. MacAdam said in his affidavit that he told the investigators not to steal any more records from the company. [R. 103-4.]

of witnesses or the production of books, records or other documents or physical evidence deemed relevant to the inquiry are conferred only upon limited persons and bodies.

All through the statutes runs the right of legal process to any of these boards or agencies, by which it must be inferred that Congress condemned illegal process or proceedings of any kind not authorized by law.

In *Federal Trade Commission v. American Tobacco Co.*, 68 L. Ed., the Court said:

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."

The Office of Price Administration has come into court to defend the seizure, just as the prohibition agents did in the *Go-Bart* case.

Back of every statute, rule or regulation stands the Constitution of the United States and the Bill of Rights as the supreme document which neither Congress, nor the Office of Price Administration, nor any other agency of the Government may ignore.

In *West Virginia State Board of Education v. Barnett*, 319 U. S. 624, the court held that the United States Government was set up by the consent of the governed and the Bill of Rights denies those in power any legal opportunity to coerce that consent, and that the purpose of the

Bill of Rights (which includes of course the 4th Amendment and unreasonable search and seizure) to withdraw certain subjects from the vicissitudes of the Government and to place them beyond the reach of majorities and officers and establish them as legal principles to be followed by the courts.

It is pointed out in that case that

> "Without promise of a limiting Bill of Rights it is doubtful that our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."

In *Hague v. The Committee for Industrial Organization,* 101 Fed. (2d) 774, the courts held that the constitutional provisions granting freedom from unlawful searches and seizures are of the very essense of civil liberty. The court further held that searches and seizures are unreasonable if they are carried out without probable cause. The court further held that the constitutional provisions granting freedom from unlawful searches and seizures are among the privileges and immunities of federal citizenship.

If as contended by the appellant Section 202 (b) of the Emergency Price Control Act gives the right to any investigators of the Office of Price Administration to go into any place of business and examine without probable cause and without personal knowledge upon the part of the searching officer of any wrongdoing and in fact with-

out any crime or crimes having been committed (*Hague v. Congress of Industrial Organization,* 101 Fed. (2d) 781), and there take and seize any records and documents, inspect them, copy them and remove them, at his whim and wish then we challenge that section as itself being violative of the 4th and 5th Amendments to the Constitution of the United States, as itself making provisions which violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and that right shall not be violated.

But not even under a search warrant may officers of the Government of the United States search and seize papers for the purpose of securing evidence.

In *Couled v. United States,* 255 U. S. 298, 65 L. Ed. 647, the court pointed out as follows:

> "Although search warrants have thus been used in many cases ever since the adoption of the Constitution and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the Boyd and Weeks Cases, *supra*, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding. . . ."

The court further said in referring to some of the papers seized:

> "The Government could desire its possession only to use it as evidence against the defendant and to search for and seize it for such purpose was unlawful."

The court further said in this case that the 4th Amendment should be liberally construed in its favor.

In *Amos v. United States,* 255 U. S. 313; 65 L. Ed. 655, the court said that

> "The contention that the constitutional rights of defendant were waived when his wife, admitted to his home the Government officers, who came, without warrant, demanding admission to make search of it under Government authority cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected."

No consent could arise in view of the clear statement in the *Amos* case and the admitted fact that the investigators for the Office of Price Administration represented themselves to have authority to proceed under the Act.

In *Hague v. Congress of Industrial Organization,* 307 U. S., 527; 83 L. Ed. 1443, it is stated:

> "The Preamble of the Constitution, proclaiming the establishment of the Constitution, in order to secure the Blessings of Liberty uses the word 'secure' in the sense of 'protect' or 'make certain' . . ."

We respectfully submit that no greater duty devolves upon this court than to secure to its citizens the blessings of Liberty guaranteed by the 4th Amendment to the Constitution of the United States.

If the private records of all businesses are, as contended for by the government "quasi-public" records then the 4th Amendment to the Constitution has been abolished

by the Emergency Price Control Act, and any investigator for the OPA can roam into any place of business and supersnoop at will.

That Congress had no such intention of granting such attempt to sidestep the 4th Amendment of the Constitution of the United States is shown by the fact that in the last Act Congress provided "Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel." Thus it showed the congressional intent that not only should persons be subpoenaed but have the constitutional right to be represented by counsel in these proceedings.

Further analysis of the Act, however, shows clearly that Congress did not intend in these civil cases to give any more rights to the investigators for the OPA in civil matters than anyone else.

Under certain conditions persons who are classified as those being other than in the course of trade or business are given the right to bring an action and the government is not permitted to bring an action in the first instance unless those persons do not exercise that right.

Under such circumstances would any one say that the private individual could go into another man's place of business and demand access to those records claiming that they were "quasi-public" records and if such private person does not have the right, do investigators of the Government engaged in an exploratory search have the right to do so on the theory that something might turn up for which a penal action could be filed? No such intent and purpose appears in the Act and if it did so we respectfully submit that it would be in violation of the 4th and 5th Amendments.

Our early history of liberty was founded upon these constitutional guarantees. Even before the Constitution historians have said that the Declaration of Independence was written with the grievances in mind of King George III, who history states: "He has . . . sent hither swarms of officers to harass our people." (See Carl M. Becker, Declaration of Independence.)

It appears without contradiction that OPA officers and investigators alike were served in writing and that they were personally requested on August 7, 1943 to desist from any further investigation and that they did desist from any further investigation or illegal search or seizure, and that they did desist until August 13th when they returned again and were served in writing.

Is such procedure permitted either with or without search warrant by government agents seeking evidence to enforce a penalty?

In *Chester Bowles, Administrator v. Beatrice Creamery Company,* in the District Court of Wyoming, decided July 24, 1944, 56 Fed. Sup. 805, the court said, quoting from *Federal Trade Com. v. American Tobacco Co.,* 264 U. S. 298:

> " '2. The mere facts of carrying on commerce not confined within state lines and of being organized as a corporation do not make men's affairs public. *Id.*
>
> '3. A governmental fishing expedition into the papers of a private corporation, on the possibility that they may disclose evidence of crime, is so contrary to first principles of justice, if not defiant of the Fourth Amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in most explicit language. P. 306.

'4. The above act, (9), provides that the Commission shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any documentary evidence of any corporation being investigated or proceeded against, and that, to enforce compliance, writs of mandamus may issue upon application of the Attorney-General. *Held,* that access is confined to such documents as are relevant as evidence to the inquiry or complaint before the commission, and that their disclosure cannot be compelled without some evidence of their relevancy and upon a reasonable demand.' "

"The point to be accentuated would be that the rights of the government go only to such documents as are relevant to the matter under investigation and that disclosure thereof cannot be compelled without some showing of the relevancy. It is significant here in that the same sort of disclosure was authorized by Congress on behalf of the Federal Trade Commission as is authorized by the Act in connection with the enforcement of the Emergency Price Control Act. If the American Tobacco Company case correctly expounded the law in regard to the limitations which surround investigations by Federal authorities, how much greater is the offense as in the case at bar, that those authorities should go to defendants and demand the right to indiscriminately examine all their books, accounts and private business papers without any showing whatever as to their relevancy. By this decision no attempt may be inferred to limit the rights of the Administrator through the power of subpoena to secure testimony or the production of certain specified documents on proper showing being made as to their existence, but to sustain the act of the Administrator in these cases would mean that the affairs of any business

concern at any time, without showing, would be, in the language of Mr. Justice Holmes 'entitled to conduct fishing expeditions into private papers on the possibility that they may disclose evidence of crime'.

"Numerous cases are cited in that opinion which sustain the view of the Court as announced, and this Memorandum will not be prolonged by repeating them. That the Constitutional rights of the people are not restricted by War Emergencies, out of which the Price Control Act originated, is definitely announced in *Ex parte* Milligan, 4 Wall. 2. The conclusion therefore is that unless the inspection in this case was entirely voluntary on the part of the defendants, their Constitutional rights have been invaded and that their proper redress would be through the suppression of the evidence gained by the Administrator through such inspections.

"Without setting out in detail the evidence presented to the Court as to what occurred at the time the inspectors visited the business places of the defendants with the demand that they might be permitted to inspect the books, records and documents, it may be briefly said that the inspectors presented themselves at the respective places of business, revealed their identity and their designated authority as agents under the Price Control Authority and asserted that they had the power under the Act to demand and receive the right to make such inspection. While the evidence may vary to some extent, this seems to be the statement of what took place at the time. The testimony likewise varies somewhat as to what the attitude of the defendants was but evidently both consented, at least to the extent that they offered no physical force in objecing to the demand of the inspector. As it now appears, the representation of the agents that they had authority un-

der the Act to inspect, in a general way, all the books and records of the defendants, was erroneous as a legal proposition because, if we are correct in our conclusions, they had no such right and defendants' submission to the demand of the inspectors was in the nature of a peaceful submission to officers of the law and was not a consent amounting to a waiver of their Constitutional rights. United States v. Slusser, 270 Fed. (D. C. Ohio) 818; United States v. Marra, 40 Fed. 2d (D. C. N. Y.) 271; United States v. Rembert, 284 Fed. 996; United States v. Ruffner, 51 Fed. 2d, (D. C. Md.) 579; *In Re* Lobosco, 11 Fed. 2d, 892.

"For the reasons stated, all evidence secured by the Agents of the plaintiff through their illegal demand for inspection without Constitutional authority, together with all evidence which was subsequently secured by them through the revelations of such illegal inspections and examinations of the books, accounts and records of the defendants will be suppressed in the cases pending and an appropriate order may be submitted to this effect, in collaboration with counsel for plaintiff, on or before July 31, 1944, exceptions being reversed and allowed to plaintiff."

The matter of unlawful search and seizure is within the summary control of the trial court.

In the case of Schechter v. United States, 295 U. S. 495 (79 L. Ed. 1570-1591), Justice Cardozo said:

"I pointed out in an opinion that there had been no granting to the investigator of any roving commission to inquire into evils and then, upon discovering them, do anything he pleased. . . ."

If this power could not even be granted to the President how much less could it be granted to a couple of investigators for the OPA?

IB.

The Emergency Price Control Act, as Construed and Applied by the Circuit Court of Appeals Is Unconstitutional and in Violation of the Fourth and Fifth Amendments to the Constitution of the United States.

As construed by the Circuit Court of Appeals, the provisions of the Emergency Price Control Act of 1942 permit any investigators to go into any man's place of business and rummage at will, and then use the evidence so gained against the person whose place of business has been rumaged to bring a civil action but penal in nature and to use such evidence and data against him without any processes or proceeding.

It is respectfully submitted that such a construction is in conflict with the Fourth Amendment of the Constitution of the United States and the decision of *Boyd v. United States,* 29 L. Ed. 746, which decision was handed down after the Civil War.

Certainly the Government's business has not become everybody's business—yet. And everybody's business has not become the Government's business—yet. But this decision would make it so.

In *United States v. Lefkowitz,* 285 U. S. 463, 76 L. Ed. 882, the court said: "The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy." Also: "Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not be searched for and taken even under a search warrant issued upon ample evidence precisely describing such things and disclosing exactly where they were."

This Court has called the mea a "war time meas-
ure." But the United States S e Court has said
in Ex parte Milligan, 4 Wall. 2, 21:

"The Constituion of the d States is a law
for rulers and people, eq in war and in
peace."

In *Ex parte Endo,* 89 L. Ed. 229, the Supreme Court said:

We mention these constitution visions not to stir
the constitutional issues which h en argued at the
bar but to indicate the approach we think should
be made to an Act of Congress o order of the Chief
Executive that touches the sensiti a of rights speci-
fically guaranteed by the Consti This Court has
quite consistently given a narrow pe for the opera-
tion of the presumption of consti ality when legisla-
of the Constitution. We have like pecific prohibition
pretation of legislation which giv favored that inter-
of surviving the test of constituti he greater chance
are suggestive here. We must ass y. Those analogies
cutive and members of Congress, a at the Chief Exe-
sensitive to and respectful of the as the courts, are
In interpreting a war-time mea ies of the citizen.
that their purpose was to allow we must assume
sible accommodation between t he greatest pos-
exigencies of war. We must a liberties and the
find implied powers in a grant o when asked to
tive authority, that the law ma slative or execu-
no greater restraint on the citi ntended to place
and unmistakably indicated by t han was clearly
guage they used.

As the United States Supreme C as said in *Thomas v. Collins,* 89 L. Ed. 340, p. 354,

"The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the National itself, can prohibit, restrain, or impede. If the restraint were smaller than it is, it is from petty tyrannies that larger ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in the soil grow great, and, growing, break down the foundations of liberty."

The Circuit Court erred in factual statements in the case with reference to the unlawful search and seizure. At the time that the officers seized the records, none of which were before the Court, the officers admitted that they had only looked at two month's invoices. It was only after the notices to desist in violation of the constitutional rights of the appellees that the agents of the Government seized and copied other records and invoices, which have become the basis of their present complaint.

And what the Circuit Court has overlooked is that *officers of* the Government may, under the expression of this Court, *search* and *seize* records in order to make a *civil* case against individuals.

Never before in the history of the United States do we know of any litigant, either the Government or other litigants, being able to search and seize a person's place of business for the purpose of suing him civilly. Surely no private litigant, having the right to sue for treble damages, could go into a store and grab records for the purpose of bringing this type of action. Has the Government any more rights than private litigants for bringing the action under the

O. P. A. law, and can the Government officers, by reason of their official position, do what private litigants can not do? The question calls for serious and sober reflection and reconsideration.

The Circuit Court has stated in its opinion that:

> "Nor in a civil action does illegality of the means by which evidence has been procured afford grounds for a Motion to Dismiss. The defenses which may be interposed by motion are confined to those enumerated in Rule 12-B."

The Circuit Court has overlooked the fact that while this is a civil action in form, it is penal in its nature. Therefore, no matter how the cause of action might be disguised, or what terminology may be applied to it, whether civil, penal, criminal, or otherwise, the guarantees of the Fourth Amendment are equally applicable.

The Circuit Court has evidently overlooked the fact that the case of *Boyd v. United States*, 29 L. Ed. 746, was a civil case in which there was a suit to forfeit 35 cases of plate glass. The court in its analysis of that case said:

> "It is our opinion therefore that a compudsory production of a man's private papers to establish a criminal charge against him, *or to forfeit his property*, is without the scope of the Fourth Amendment to the Constitution, in all cases which a search and seizure would be."

And the court further said:

> "Now it is elementary knowledge that one cardinal rule of the Court of Chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property is

contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power; but it cannot abide the pure atmosphere of political liberty and freedom."

The court further points out:

"Reverting then to the peculiar phraseology of this Act and to the information in the present case, which is founded on it, we have to deal with an Act which expressly excludes criminal proceedings from its operation, although embracing civil suits for penalties and forfeitures, and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both."

Thus it appears that the Boyd case is a complete answer to the statement of the Circuit Court that in civil actions the illegality of the means by which evidence has been procured does not afford grounds for a Motion to Dismiss. This is contrary to the express provisions of the Fourth Amendment which we do not deem that Congress intended to override in adopting the Emergency Price Control Act, for along with all the other presumptions it must be presumed that Congress intended to adopt an Act in compliance with the Fourth Amendment and with the free spirit of American government for which we are fighting.

II.

The Circuit Court of Appeals Erred in Holding That Records of a Corporation or of Individuals Become Quasi-Public Records by Reason of the Emergency Price Control Act of 1942.

If the decision of the Circuit Court of Appeals is to remain the law in this case, then everybody's business is the Government's business, for no person is immune from the O. P. A.'s requirements of today. Therefore, everybody's records are quasi-public records, whether in their private vault, as in the case of these petitioners or somewhere else. Everyone today must make out some kind of records for the Office of Price Administration, have some kind of O. P. A. stamps in their possession, and otherwise are beholden to this Agency. Does this make everybody's home, office or business subject to a roving commission by the investigators of the O. P. A.? If these records are quasi-public and require no process or pretended process, then the Fourth Amendment has been abolished by an Act of Congress and such a holding would raise a challenge as to the validity of the Statute itself as being violative of the Fourth Amendment to the Constitution of the United States. (*Boyd v. United States*, 29 L. Ed. 746, 116 U. S. 660.) In that case this Court held an Act of Congress invalid which made the failure to produce certain books, papers and records in Court an admission of tax liability. Here the Act as construed by the Circuit Court goes even further and makes all records of any corporation or person quasi-public in the discretion of the investigators of the O. P. A.; abolishes all need for subpoena *duces tecum*, process or pretended process of any kind or character.

We have had other wars, but the restrictions against unreasonable search and seizures have always extended to all those periods.

If Congress had desired to clothe the Administrator with such arbitrary powers, it could have well said so and it did not lack any language to say that all records would be *quasi-public* records and that the Administrator would have access to them at all times.

But the Congress did not give such rights, for if it had done so it would not have provided for the power of subpoena and the processes of Court in the Act.

There would have been no reason for giving any such powers in the Act as the subpoena powers and there would have been no provisions in the Act requiring a hearing in Court for contumacy for disobeying the Act. It would have provided that any person who disobeyed the Administrator would be in contempt and could be summarily taken into Court. This the Act did not provide. In fact no Act of Congress has ever gone so far as to declare all records to be *quasi-public*, even though they are necessary to be kept. Thus income tax records are not declared to be *quasi-public*, although they are declared to be kept for the Internal Revenue Department. Alcohol tax records are not designated as *quasi-public*, although the Government has for many years levied heavy taxes on whisky and alcohol and it has been one of the main supports of the Government since early days. Yet nowhere have these records been held to be *quasi-public*. Even under prohibition days and the constitutional provisions against alcohol was there any relaxation of the constitutional mandates forbidding unlawful search and seizure, and there is nothing in any war time legislation as broad as that here stated by the Court.

Not even the right to inspect Government contracts has carried with it such broad powers. The Wage and Hours law did not give the Secretary of Labor power to inspect records without proper subpoena. (*Cudahy Packing Company v. Holland*, 315 U. S. 355, 86 L. Ed. 895.)

Great reliance is placed by the Circuit Court of Appeals upon the case of *Wilson v. U. S.*, 221 U. S. 361, 55 L. Ed. 771, where the Court pointed out the distinction in the matter of privilege between private papers or records and those of a public or *quasi-public* nature, saying that in the case of public records and official documents the officer in possession of them is not justified in resisting inspection, even though the record was made by himself and would supply evidence of his criminal dereliction.

But the Circuit Court has overlooked the fact that the *Wilson* case is based upon a *subpoena duces tecum* in which the corporation was commanded by *legal process* to produce the records specified in the subpoena.

The *Wilson* case is not authority for the fact that no process is required to produce the records, but on the contrary is authority for the fact that process is required. The Court specifically says in the *Wilson* case, referring to the *subpoena duces tecum* "That demand, expressed in *lawful process*, confined its requirements within the limits which reason imposes in the circumstances of the case, the Corporation has no privilege to refuse."

Thus the Supreme Court has said that whether the records are public or private or *quasi-public*, a demand expressed in lawful process (*subpoena duces tecum*) requires their production.

With this principle we agree, for it is the mode and manner in which not only the *Wilson* case holds that it is proper for documents to be produced, but it is the expression of the Emergency Price Control Act itself.

For why would the Act provide for subpoena at all if the records of all persons or corporations were *quasi-public* and could be inspected without them? The question answers itself.

Furthermore, Congressional investigation of the acts of the officers of the Office of Price Administration in overlooking the subpoena process is itself strong and cogent proof that Congress felt that its authority had been abused. The very counsel who had appeared before this Court was called before a Congressional Committee and interrogated regarding the improper use of *subpoena duces tecum*.

Furthermore, if officers of the O. P. A. can enter a place of business and seize records, as in this case, then the other provisions of the Act become a nullity for such procedure would deprive all businesses of their right of counsel or their right to have a receipt taken for any books and papers that are seized.

Any corporations and individuals might have a complete defense to any charges of violation of the Act for which damages are sought and might have a complete defense to such suits but would find all their records gone with no receipt, with no redress, with no rights.

Congress surely did not put any such provision in the language of the O. P. A. Act.

In the case of *Rodgers v. United States*, 138 F. (2d) 992, there was no issue of the requirement of a *subpoena* nor of any investigation under an unlawful search and

seizure under the circumstances of the present case. In fact the only question involved in the *Rodgers* case was whether the Act which requires a farm operator to make reports pursuant to the Cotton Marketing Quota Provisions of the Agricultural Act of 1938 invaded the right of privacy or constituted unjust coercion. This is very different from the case at bar. The Court in that case only held that those engaged in business subject to public regulation were under an obligation to keep records and make reports. The Court there said:

> "The keeping of records and the making of reports under the statute of which appellant complains have none of the characteristics of entrapment, invasion of the right of privacy or unjust coercion of individuals which are the genesis of the Fourth Amendment."

Thus this very case would be authority for the fact that the appellees' right of privacy was invaded, that they were not unjustly coerced—the genesis of the Fourth Amendment.

The case of *Fleming v. Montgomery Ward*, 114 F. (2d) 384, a Fair Labor Standards case, was also a case where the Wages and Hours documents were sought under a *subpoena duces tecum*. Again we have unlawful process expressed in the form of a subpoena and the Court further discusses the need for probable cause before there can be a search and seizure. The case is further authority for the fact that not only must there be a *subpoena duces tecum*, but the subpoena must be reason-

able and after its issue the person against whom it is issued may appear in Court to determine the reasonableness of the subpoena before it is required to produce that which has been commanded in lawful process.

In the case of *Gukenheimer & Co. v. United States*, 3 Fed. (2d) 786, there again was an investigation by the Federal Prohibition Agents regarding whisky shipments. The prohibition officers demanded and received the papers in question. It appears that the papers were given up voluntarily and therefore the Court held that the defendants in that case

> "having voluntarily surrendered the papers for one purpose, their use at the trial of this case for another purpose was not the result of a search and seizure, and therefore was in violation of the corporation's rights under the Fourth Amendment."

It would appear, therefore, that the Court conceded that the corporation had rights under the Fourth Amendment, but that in the instant case they were not violated.

III.

In Prescribing Rules in Civil Actions, This Court Has Held Not Even the Supreme Court of the United States May "Modify, Abridge or Enlarge the Substantive Rights of Litigants Under the Constitution of the United States or Enlarge or Diminish the Jurisdiction of the Federal Courts."

The court was without jurisdiction to proceed in this case.

The appellant proceeded on the theory that jurisdiction is conferred by a mere assurance in their complaint "jurisdiction in this action is conferred upon this court by Section 205(c) of the Act and by Section 205(e) of the Act but such assertion is insufficient to confer jurisdiction, for jurisdiction is three-fold: First of the person, sceond of the subject matter and third, to bring the particular action in the case. In this respect not even the Supreme Court of the United States in prescribing rules of procedure in civil actions may modify, abridge or enlarge the substantive rights of litigants under the Constitution of the United States or enlarge or diminish the jurisdiction of the federal courts.

United States v. Sherwood, 312 U. S. 584, 85 L. Ed. 1058;

Shibbach v. Wilson, 312 U. S. 1, 85 L. Ed. 479;

United States v. 11,150 Pounds of Butter, 195 Fed. 657, 663.

The complaint in this case fails to set up a single fact from which the court can determine whether it has jurisdiction of the subject matter. The complaint does not state the persons to whom the lumber was claimed to be

sold, does not state which one of the defendants sold it, and does not state any fact from which the court itself could determine that it has jurisdiction of the subject matter of this litigation.

In *Securities and Exchange Comm. v. Time Trust, Inc.*, 28 Fed. Supp. 34, at page 42, the court said:

> "The Securities Act permits of both civil and criminal proceedings. The allegations of the complaint should be as simple as those of an indictment under the provisions of the mail fraud statute. In Hagner v. United States it was said that the true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet. Here the allegations of fraud are not only in the language of the statute, but they are also set forth with particularity so as to apprise the defendants of the charges against them."

The court points out that the "allegations show in detail the mechanics and operations of the plan" and specify "fifteen specific representations which defendants are charged with having made or caused to be made . . ." "The complaint, exclusive of the exhibits attached thereto, consists of twenty typewritten pages, . . ." The court says that the complaint "fully conforms to the new Rules of Civil Procedure."

In *United States v. Johnson*, 53 Fed. Supp. 167, the court held with reference to an indictment in an OPA case:

> "Sufficient facts of a crime committed must be stated in an indictment to support a conviction. Specifically, the court and defendants must be able to determine this from the indictment, the statutes and the pertinent administrative regulations passed pursuant to the statutes. If the facts alleged may all be true and yet appear to constitute no offense, the indictment is insufficient. . . ."
>
> "The purpose of such requirements is to give a defendant the fair opportunity to prepare his defense and enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime. . . ."
>
> "It is impossible to glean from the allegations of each indictment, the Act, and the regulations what, in fact the ceiling price was for the commodity, notwithstanding that the prices mentioned in the indictments are the ceiling prices or are below the ceiling prices. Since the Act and the regulation do not establish any specific ceiling price for the commodity *sub judice*, defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner in which it arrived at this conclusion. It may be that the government's method of calculation is erroneous. If so, defendants should have the opportunity to challenge this defect if, in fact, it exists."

Judged by these standards nothing is set out in the complaint that gives the court or defendant fair notice of the case, nor does it give the court or defendant an opportunity to determine whether a claim is stated. As

this is a penal statute it should be strictly construed in the light of penalty and as time and place are material elements in considering whether a complaint states jurisdictional facts (Rule 9(f), Rules of Civil Procedure), it is respectfully submitted that the complaint states insufficient jurisdictional facts.

In *Fleming v. Dierks Lumber and Coal Company*, 39 Fed. Supp. 237, the court said:

> "I am of the opinion that the framers of the rules did not intend to permit a plaintiff to subject a defendant to the various processes of the court without first stating definite facts upon which a judgment might be based. . . ."
>
> "I do not think that Rules 26-37 relating to depositions and discovery should supplant the requirement of pleadings sufficiently advising a defendant of the nature of the claim and enabling him to prepare his responsive pleading and generally prepare for trial. . . ."
>
> "A 'short and plain statement' must be reasonably definite or it will not be plain. A speedy and just and inexpensive trial cannot be had merely upon the filing of a notice of claim and then resorting to the expensive and indefinite procedure of discovery and depositions."

Jurisdiction—the power to hear and determine the cause, and to bring the action, is only conferred upon the administrator when a certain state of facts exist—and not in all cases.

Section 925 (205-e), Title 50, App.

Hence, before a claim is state
had, the complaint must state f which relief may be
may determine and which the de om which the court
that the court may determine w its may challenge so
exists. jurisdiction in fact

These are conditions preceden

This is as essential as an alle inging the action.
the court may determine divers of fact from which
$3,000 jurisdiction amount in c citizenship and the
facts are necessary to jurisdicti ases, in which such

It is clear from the Act, that a federal court.
for which relief can be had. der to state a claim
cify each transaction so that the mplaint must spe-
may see, and that the parties m in the first instance
condition precedent has or has ermine, whether the
say, whether the buyer has or en place, that is to
who the buyer is, and what type not filed an action,
may be determined whether the a right to bring the action. Unyer he is, so that it
the court cannot tell whether it ment has or has not
is the defendant in a position to ese facts are set up
of jurisdiction for want of com risdiction. Neither
precedent, namely, an allegation he question of lack
and the type of buyer he is, and with the conditions
brought an action and what the who the buyer is
brought an action the governme r he has or has not
diction. If he is a buyer in the was for. If he has
business, as that may ultimately uld not have juris-
buyer in bad faith and would not course of trade or
action, then the government wou fined, or if he is a
each of these things must necessa a right to bring an
plaint by the plaintiff, who has e jurisdiction. But
set up in the com-
rden of going for-

ward and setting forth facts which show the court that it has jurisdiction.

Footnote: In a criminal complaint a typical charge is as follows: *Fink v. U. S.*, No. 10483, U. S. Circuit Court of Appeals for the Ninth Circuit (Count One):

> "That on or about the 1st day of June, 1942, in the City of Los Angeles, County of Los Angeles, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, California Refrigeration Repair Shop, a corporation, and Charles L. Fink, did knowingly, wilfully and unlawfully offer for sale, and sell and deliver to William H. Hensey, an individual, a certain used 1934 Frigidaire Model No. Std. 534 refrigerator in 'as is' condition, for the sum of $88 plus $2.64 California State Sales Tax, which said refrigerator had a maximum ceiling price of $20 under the provisions of Maximum Price Regulation No. 139 (7 Fed. Reg. 3393, 7 Fed. Reg. 6053) issued by Leon Henderson, as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, (Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). (3)"

A claim for a penal action must be well pleaded and at least have the elements of an indictment. (*Securities and Exchange Commission v. Time Trust*, 28 F. S. 30.)

Compare this with the charging part of the allegation of the complaint in the *Glick* case, which is as follows:

> "From and including October 1, 1942, more than six months after the effective date of the Act, to and including September 30, 1943, the defendants, and each of them, dealers in lumber, doing business at 8423 South Alameda Street, in the City of Los Angeles, State of California, sold and delivered at Wholesale various grades and kinds of lumber to various and divers customers. None of said purchases was made for use or consumption other than in the course of trade or business. The defendants, and each of them, demanded and received a price or consideration for each such delivery of said lumber in excess of the maximum price established therefor by the General Maximum Price Regulation."

Remembering that in the pleadings of a penal nature that the pleadings should specify enough to inform the accused of the nature and cause of the accusation (*U. S. v. Cruickshank*, 92 U. S.) it is respectfully submitted that the complaint in this case failed to set forth a single fact from which the court can tell it has jurisdiction or the defendants can challenge it.

IV.

The Statute, as Construed and Applied in This Case, Is Unconstitutional, as Having No Reasonable Relationship Between the Congressional Intent and the Acts of the Price Administrator.

Fair construction of the "Enforcement" section giving damages would indicate that it was the "poor man's" remedy for any overcharges for consumer goods, this being shown by the fact that it provided for $50 or three times the overcharge, whichever was greater, as damages for such overcharge.

In Senate Report 931, Seventy-seventh Congress, it is said:

> "Such actions have proved valuable in the enforcement of other regulatory statutes, such as the Fair Labor Standards Act, both to relieve the government of a part of the burden of enforcement and to deter initial violations. They afford the remedy at law to persons *damaged* by having had to pay unlawfully high prices."

In the Fair Labor Standards cases and other statutes giving a right of action, the person damaged is given the right of action.

But the Emergency Price Control Act, after presumably having this purpose in mind, then proceeds to take it away from most purchasers, and says the Administration may sue, but not the purchaser who was damaged, if the purchase was made "in the course of business or trade"—which words are not defined.

The Emergency Price Control Act as originally offered did not contain any such provision. (See Congressional Record, Vol. 87, part 8, page 9074, entitled

"Enforcement.") Upon presentation of the section (Congressional Record, Vol. 87, part 9, page 9148) under "Enforcement" this provision again was not in the Act. It was only shortly before the law was passed that subsection (e) was put into the Act. The Congressional Record does not reveal any debates or discussions before Congress with reference to this section, and the legislation was passed as emergency legislation. It is significant, as appellant's brief points out, that the purpose of the Act was to "permit private purchasers who buy for personal use or consumption, rather than in the course of trade or business, to protect themselves against violations of the Act." (App. Br. p. 14.)

The House bill had contained no treble damage provision. The Senate draft of the section was not changed by the conference committee and was enacted by Congress.

But Congress, in enacting a law providing a maximum penalty of $5,000 for a criminal offense and for civil sanctions by way of injunction for other provisions, did not intend to provide the Administrator with the right to penalize a person or business by bringing this kind of action when the courts themselves, in criminal actions, were authorized to impose a maximum fine or penalty of $5,000.

The provision enabling the Administrator to sue was no doubt put in the bill to provide the United States a remedy, where the United States is the consumer, and also if the buyer is not entitled to bring suit because he is barred for bad faith in being a black market operator.

This was the position taken by the District Court, and it is supported by the report of Mr. Brown in the Com-

mittee on Banking and Currency, 77th Cong. Report 931, to accompany the H. R. 5990. This report states:

> "The further provision that the Administrator may sue on behalf of the United States, not only where the United States is the consumer, but also if the buyer is not entitled to bring suit, will apply to situations in which the buyer is barred for bad faith or for some other reason, or in which the buyer is a purchaser in the course of trade or business."

The discussion, however, does not define "course of trade or business" and does not throw any light on who is a buyer within the meaning of the Act. That a considerable portion of the Act is devoted to rent regulations, which are defined to be a commodity within the meaning of the Act, and that the section was designed only to permit damages to be recovered by persons who are *damaged* by having had to pay unlawfully high prices, is clear from the entire tenor of the Act. Yet this second portion of the section and the provision which is now under construction, would bar the buyer completely from any remedy or damages, and would therefore have no reasonable purpose or relationship to the object Congress sought to have in this provision.[4]

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[4]Senate Report 931, Seventy-seventh Congress, says: "Such actions have proved valuable in the enforcement of other regulatory statutes, such as the Fair Labor Standards Act, both to relieve the government of a part of the burden of enforcement and to deter initial violations. They afford the remedy at law to persons *damaged* by having had to pay unlawfully high prices."

Of course no one would deny the Administrator the right to bring an action if the government was the purchaser and in fact was damaged, and in those cases, as construed by the court in this case, the operators were "black market operators." The Act could reasonably be enforced under those circumstances by the Administrator. But any other purpose or object has no reasonable relationship to the objects sought to be attained, and therefore this particular provision is unconstitutional and void. (6 *R. C. L.* 207; *In re Page,* 19 Cal. App. (2d) 1.)

Federal and State Authorites Holding Statute Must Have a Reasonable Relationship Between the Purposes Expressed and the Object Sought to Be Attained Are the Following:

1 *Wigmore on Evidence* (2d ed.), Sec. 7;

Manley v. Georgia, 279 U. S. 1;

Tot v. U. S., 319 U. S. 463 (1942), 87 L. ed. 1524;

Western & Atlantic v. Henderson, 279 U. S. 639, 73 L. ed. 884 (1929);

In re Opinion of Justices, 208 Mass. 619, 94 N. E. 1044 (1911);

Hammond v. State, 78 Ohio State 15, 84 N. E. 416, 125 A. S. R. 684 (1908);

State v. Grimmett, 33 Idaho 203, 193 Pac. 380 (1920).

V.

The Statute Is Too Vague and Indefinite to Form a Standard for Illegal Conduct and to Inform Men When They Might Be Liable to a Penalty and Therefore Violates the Fifth Amendment to the Constitution of the United States.

The District Court, in its opinion, while holding that the statute was vague, indefinite and uncertain, endeavored, nevertheless, to uphold its constitutionality as to the meaning of the words "for use or consumption other than in the course of trade or business." It construed the statute to have an application to the bootlegger, and on this basis upheld the constitutionality of the vague portions of the statute. The question was argued at length in the Circuit Court of Appeals, but that Court did not pass on the issue thus raised.

It was the right of the appellee to have the decision of the Court below sustained, even though upon different grounds than those used by the District Court, and the decision below should be sustained if it can be upon any ground urged by the petitioner herein, who was the appellee below. *Helvering v. Gowring,* 302 U. S. 238, 82 L. Ed. 234.

It is a fundamental rule in the Federal Court that a party in an appeal is entitled to have each point raised by him, even though he is the appellee, passed upon by the Circuit Court of Appeals. Also, that the appellee may urge any matters appearing in the record in support of the judgment below and to have the Court pass upon the same. (*United States and Interstate Commerce Commission v. American Railway Express Co., et al.,* 265 U.

S. 425; *Holyoke Water Power Co. v. American Writing Paper Co.*, 83 Fed. (2d) 398, 402; *Lagnes v. Green*, 282 U. S. 531.)

Before the Administrator had a right to bring the action, he had to show that the statute had conferred jurisdiction upon him by reason of the conditions precedent set forth in the statute and by reason of the fact that the commodity was purchased for use or consumption in the course of trade or business. If it was purchased "for use or consumption other than in the course of trade or business," then the purchaser under the statute would have the right to bring the action and not the Administrator, but this phrase was for use or consumption other than in the course of trade or business, has no definition in the statute and it is so vague and indefinite as to fail to form a standard for a penalty. Its meaning has resulted in conflicting decisions by different District Courts. The Circuit Court of Appeals entirely avoided meeting the issue raised by the petitioner as to the indefiniteness of this phrase "in the course of trade or business."

The phrase in the statute "in the course of trade or business" upon which this action is based is so vague and indefinite as to fail to form a standard for a penalty—that it requires further definition not contained in the statute. The courts have been confused as to the meaning of the phrase "in the course of trade or business," as shown by conflicting decisions through various circuits in the country. The decision of this Court has entirely avoided meeting the issues as to the indefiniteness of the phrase "in the course of trade or business" raised by appellee in its brief. We cited *Hewett v. State Board of*

Medical Examiners, 148 Cal. 590, and cases therein cited; *Connolly v. General Construction Company,* 269 U. S. 382, 70 L. Ed. 322; *U. S. v. Capitol Traction Co.,* 34 App. D. C.

In *Bowles v. Seminole Rock & Sand Company,* No. 914, October 1944 term, now before this Court the District Court held that the right of action was in the purchaser; the Circuit Court held it was in the administrator.

In *United States v. Capital Traction Co.,* 34 App. D. C., there is an approved test, as follows:

> ". . . The dividing line between what is lawful and unlawful canont be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

No better argument exists as to the uncertainty of the statute than that different courts differ as to the meaning and application of the phrase.

Who is a "user in the course of trade or business" or who is a person who "is dealing in a commodity other than in the course of trade or business"?

What is the meaning of "course of trade or business"? Is one who buys an article which he consumes to make products for another acting in the "course of trade or business"?

A person who goes into a store and buys a commodity is engaging in trade or business. In the ordinary sense of the word every purchaser and every seller of a commodity is engaging in trade or business. Some courts have attempted to read into this phrase a meaning that it is for persons who buy or sell for their own consumption, but the statute does not say this. On the other hand, the statute leaves the matter entirely indefinite. We must therefore perhaps look to the purposes and objectives of the statute, if they can be determined; and if the statute has no reasonable relationship to the objects sought to be attained, then it is unconstitutional.

The Emergency Price Control Act as originally offered did not contain any such provision. (See Congressional Record, Vol. 87, part 8, page 9074, entitled "Enforcement.") Upon presentation of the section (Congressional Record, Vol. 87, part 9, page 9148), under "Enforcement," this provision again was not in the Act. It was only shortly before the law was passed that subsection (e) was put into the Act. The Congressional Record does not reveal any debates or discussions before Congress with reference to this section, and the legislation was passed as emergency legislation. It is significant, as appellant's brief points out, that the purpose of the Act was to "permit private purchasers who buy for personal use or consumption, rather than in the course of trade or business, to protect themselves against violations of the Act." (App. Br. p. 14.)

The House bill had contained no treble damage provision. The Senate draft of the section was not changed by the conference committee and was enacted by Congress.

But Congress, in enacting a law providing a maximum penalty of $5,000 for a criminal offense and for civil sanctions by way of injunction for other provisions, did not intend to provide the Administrator with the right to penalize a person or business by bringing this kind of action when the courts themselves, in criminal actions, were authorized to impose a maximum fine or penalty of $5,000.

The provision enabling the Administrator to sue was no doubt put in the bill to provide the United States a remedy, where the United States is the consumer, and also if the buyer is not entitled to bring suit because he is barred for bad faith in being a black market operator.

This was the position taken by the District Court, and it is supported by the report of Mr. Brown in the Committee on Banking and Currency, 77th Cong. Report 931, to accompany the H. R. 5990. This report states:

> "The further provision that the Administrator may sue on behalf of the United States, not only where the United States is the consumer, but also if the buyer is not entitled to bring suit, will apply to situations in which the buyer is barred for bad faith or for some other reason, or in which the buyer is a purchaser in the course of trade or business."

The discussion, however, does not define "course of trade or business" and does not throw any light on who is a buyer within the meaning of the Act. That a con-

siderable portion of the Act is devoted to rent regulations, which are defined to be a commodity within the meaning of the Act, and that the section was designed only to permit damages to be recovered by persons who are *damaged* by having had to pay unlawfully high prices, is clear from the entire tenor of the Act. Yet this second portion of the section and the provision which is now under construction, would bar the buyer completely from any remedy or damages, and would therefore have no reasonable purpose or relationship to the object Congress sought to have in this provision.

10a Senate Report 931, Seventy-seventh Congress, says:

> "Such actions have proved valuable in the enforcement of other regulatory statutes, such as the Fair Labor Standards Act, both to relieve the government of a part of the burden of enforcement and to deter initial violations. They afford the remedy at law to persons *damaged* by having had to pay unlawfully high prices."

The Confusion of the Courts as to the Meaning of "in the Course of Trade or Business."

Numerous cases have already arisen under Section 205 (e) of the Act wherein judges of the various United States District Courts over the country have been obliged to interpret the language "in the course of trade or business" as used in that section.

If that language is clear and certain, those intelligent and highly trained judges must necessarily arrive at the same understanding as to the meaning of the words in question; they could not arrive at conflicting conclusions.

But if those enlightened judges, in seeking to carry out Section 205 (e) in cases brought before them, arrive at different and conflicting conclusions as to the meaning of the phrase "in the course of trade or business," that is proof conclusive of the vagary and uncertainty of the language.

The distinction must be borne in mind in determining the type of action herein. This action is penal.

Section 205(e) in so far as It Purports to Render a Seller Liable to the Government for Treble the Overcharge, Is Penal; and the Amount Recoverable by the Government Thereunder Is a Penalty.

"Remedial" and "Penal" Defined and Distinguished.

The distinction between a "remedial" action and a "penal" action is, that the former is given to, and is brought by, the party injured or aggrieved, and the recovery allowed is as compensation or indemnity for the injury done or loss sustained; such an action is "remedial," and the amount recoverable therein is held to be "compensatory" and "remedial" even though the amount recoverable is greatly in excess of the actual damage provable or sustained.

But where a statute provides that upon the commission of certain acts, by a person, the state or government is given the right to a pecuniary recovery from the person, not as compensation for any pecuniary damage sustained by, the state or government, but rather as punishment for the act of omission, then the amount recoverable is a "penalty" and the action which may be brought by the state or government for its enforcement or collection, is a "penal" action.

It is to be remembered that "penal" and "criminal" are not synonymous. "Penal" statutes are not confined or limited to "criminal" statutes; and while all "criminal" statutes are "penal," all "penal" statutes are not criminal. A statute imposing a penalty (in dollars) which is enforceable by civil action by the state or government, is as much a "penal" statute as one imposing a "fine" (in dollars) enforceable by the state or government in a "criminal" action.

U. S. v. La Franca, 282 U. S. 568;
U. S. v. Choteau, 102 U. S. 603.

"Consumers' Suits" and "Government Suits" Defined.

"Consumer's suit" as used throughout this brief, and as used by the courts in cases arising under Section 205(e) means a suit by any person who, in the purchase of a commodity, was charged a price in excess of the maximum price fixed by regulation or schedule of the Office of Price Administration. (Often herein called O.P.A.) Such suits are against the seller who made the overcharge, and are for treble the amount of the overcharge, or for $50.00 plus attorneys fees and costs, whichever is the greater.

"Government suit" means a suit brought by the Administrator of the O.P.A. on behalf of the United States, against a person who sold a commodity to some person other than the Government, at a price or prices in excess of the maximum price fixed by O.P.A. for such commodity. Of course suits brought by the Government on account of overcharges in sales to the government, fall in the class of "consumers' suits."

"Consumers' Suits" Are "Remedial."

It is a well settled rule that where a statute gives to an injured or aggrieved party a right of recovery in an arbitrary amount, the amount recoverable, even though in excess of the damage actually sustained or provable, is as compensation for the injury done or loss sustained, and such recovery is compensatory and "remedial." The real test of whether the statute or action is "remedial" or "penal" is whether the right of action is given to the injured or aggrieved party, or to the state or government. If given to the injured or aggrieved party, the statute, and the recovery allowed thereby are "remedial"; but if the right of recovery is given to the state or government then the statute and the recovery allowed thereby are "penal."

The above rule is amply demonstrated in a wide variety of cases, a few of which are as follows:

Chattanooga Foundaries & Pipe Co. v. Atlanta, 204 U. S. 390, wherein it was held that treble damage actions authorized by the antitrust act, by persons injured as a result of conspiracies and monopolies prohibited by the act, are "remedial," not penal.

Overnight Motor Transportation Co. v. Missèll, 316 U. S. 572, wherein it was held that actions by employees under the Fair Labor Standards Act, for the recovery of double the amount of unpaid wages, are "remedial," not penal.

Brady v. Daly, 175 U. S. 148, wherein it was held that, under the copyright infringement statute authorizing a recovery of $100.00 for the first day and $50.00 for each subsequent day of infringement, the amounts recoverable by the owners of the infringed copyrights are "remedial," not penal.

A. T. & S. F. Ry. v. Nichols, 264 U. S. 348, wherein it was held that the statute providing for a minimum and flat $5000.00 recovery, for death caused by the negligence of another, is remedial, and that the $5000.00 recovery provided therein is "remedial."

Whitman v. Oxford Bank, 176 U. S. 559, wherein it was held that statutes imposing a double liability upon shareholders of banks, in favor of depositors or creditors, are "remedial."

Cox v. Lykes Bros., 237 N. Y. 376, 143 N. E. 226, wherein Justice Cardozo, then Chief Justice of the New York Court of Appeals, held that a suit under the Federal Seaman's Act, which provided that seamen, whose wages were withheld, could recover two days' wages for every one during which payment was withheld, was not a suit to recover a penalty, but was a "remedial" action, and the amount recoverable was "remedial."

It will be noted that in each and all the foregoing cases and instances, the actions and the allowable recoveries are held to be "remedial" because the respective statutes provide for the bringing and maintenance of the action *by the injured or aggrieved individuals*—never by the state or government.

But entirely aside from the aforesaid well settled general law, which is fairly demonstrated by the foregoing cases, a large number of cases have been heard and decisions rendered in "consumers' suits" brought under said section 205(e) of the Emergency Price Control Act wherein the courts, generally over the country, have consistently held that such "consumers' actions" are remedial, and that the recoveries allowed therein are "remedial," rather than

penal. Practically all consumers' suits are brought in state courts, and in most instances in the lower state courts, where decisions and opinions are not reported in the published reports. However those decisions are reported in Commerce Clearing House War Law Service, Vol. 4, under paragraph numbers as indicated in connection with the following citations. A few of the many cases wherein the courts have held consumers' suits brought under section 205(e) to be "remedial" are:

Regan v. Kroger (Ill. Supreme Ct. 3-21-44), 54 N. E. (2d) 210;

Beasley v. Gottlieb (N. J. Supreme Ct. 12-28-43), 35 Atl. (2d) 49;

Silberg v. Klarfield (N. J. Supreme Ct. 5-5-44), 35 Atl. (2d) 221;

Bendit, Pl., and P. Brown, Adm. of OPA, v. HLR Co. (N. J. Supreme Court 1-5-44), 35 Atl. (2d) 53;

Rutkiewicz, Pl. and P. Brown, Adm. of OPA v. Great A. & P. Co. (Wis. Circuit Ct. Milwaukee, 6-9-43), Vol. 4, War Law Service, par. 50,963;

Kelley v. Graham, Def., and L. Henderson, Adm. of OPA (Ore. Circuit Ct., Portland), Vol. 4, War Law Service, par. 51,761;

Kline v. Hargrave, Def. and P. Brown, Adm. of OPA (Ill. Circuit Ct., 7-20-43), Vol. 4, War Law Service, par. 51,787;

Regan v. Kroger (Chicago Municipal Ct.), Vol. 4, War Law Service, par. 50,957;

Bristol v. Sun Stores (Municipal Ct., New York, 4-20-43), Vol. 4, War Law Service, par. 51,075;

Pratt v. Hollenbeck (Penn. Ct. Com. Pleas, 3-1-43), Vol. 4, War Law Service, par. 51,735;

Whatley v. Love (Ct. of Appeals, Parish of Orleans, 5-24-43), Vol. 4, War Law Service, par. 51,754;

Kaplan v. Arkellian (N. J. Dist. Ct., 1943), Vol. 4, War Law Service, par. 51,776;

Bennett v. Ondrus (N. J. Circuit Ct., 7-26-43), Vol. 4, War Law Service, par. 51,797;

Armstrong v. Aldorisio (Conn. Ct. Com. Pleas, 10-28-43), Vol. 4, War Law Service, par. 51,819;

Stofan v. Harisis (Ohio Ct. Com. Pleas, 2-10-44), Vol. 4, War Law Service, par. 51,854.

"Government Suits" Are "Penal."

However, the situation as to suits brought *by the Government* under section 205(e) for recovery of treble the overcharges, fall into an entirely different category; those "government suits" are purely penal in character; and the recovery allowable to the government in such cases is a penalty, pure and simple.

It has long been the settled law that where a statute provides that any person who commits certain acts prohibited by a law shall be liable to the payment of a sum or amount to the state or government, such statute is a penal statute, and the recovery allowable to the state or government thereunder is not by way of compensation (or

remedial) but on the contrary is by way of punishment and is a "penalty."

U. S. v. Child, 266 U. S. 304;
New York v. Jersaurt, 263 U. S. 493;
Schick v. U. S., 195 U. S. 65, 77;
Helwig v. U. S., 188 U. S. 605, 610-613;
Huntington v. Attrill, 146 U. S. 657, 667;
U. S. v. Choteau, 102 U. S. 603, 611.

So, when section 205(e) which purports to render a seller liable to the government for treble the amount of an overcharge made in a private sale to a private person, is tested by the above mentioned rule, it is readily apparent that section 205(e) (in so far as those provisions imposing a money liability to the government are concerned) is a penal statute or section; the money liability imposed upon the seller thereunder is nothing more nor less than punishment for his acts; and the amount recoverable by the government is a "penalty" pure and simple.

The question of the character of section 205(e) in so far as government suits thereunder are concerned, has frequently been before the United States District Courts over the nation, and those courts have held that section 205(e) is "penal"; that the amount recoverable by the Government in such suits is a "penalty"; and that such actions are actions for the recovery or enforcement of the "penalty."

Some of the cases and decisions referred to are:

P. Brown, Administrator, v. Glick Bros. Lumber Co., et al. (U. S. Dist. Ct., So. Dist. Calif., December 2, 1943), 52 Fed. Supp. 913.

In this case, which is the matter now at bar, the District Court in its judgment of dismissal held:

"That the action is penal in nature." [R. 196.]

And in the written opinion of the Court, filed on December 2nd, the Court said [R. 153]:

"The provision permitting the judgment for treble amounts, or $50.00, whichever is greater, is, therefore, penal in nature so far as defendants are concerned."

P. Brown, Administrator, v. Cummins Distilleries Corp. (U. S. Dist. Ct. Western Dist. Kentucky, January 12, 1944), Vol. 4, War Law Service, par. 51,081.

In this case the Court said:

"It (Sec. 205(e)) further provides that if 'the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States.'

The recovery so provided is in its nature a penalty.

'A penalty is a sum of money of which the law exacts payment by way of punishment for the doing of some act that is prohibited, or omitting to do some act that is required to be done,' Corpus Juris—Subject: Fines, forfeitures and penalties, section 72; In re Denver & R. G. W. R. Co., 27 F. Supp. 983, 984. It is essentially different from the idea of damages which is compensation to an injured party for the injury which he has suffered. In a proceeding of this nature, the plaintiff has suffered no damages, and the action is not for the purpose of compensation. Regardless of the language in the statutory provision,

it is the nature of the provision itself that is controlling. The action is essentially one for the recovery of a penalty. Hellwig v. U. S., 188 U. S. 605, 610 through 613; New York v. Jersaurt, 263 U. S. 493; United States v. Child, 266 U. S. 304; Commonwealth v. Farmers Bank & Trust Co., (C. C. A. 6th), decided December 7, 1943."

C. Bowles, Administrator, v. Curtis Candy Co. (U. S. Dict. Ct., Western Dist., Missouri, Jan. 21, 1944), Vol. 4, War Law Service, par. 51,065.

In this case the Court in its opinion said:

"In the motion to dismiss, the defendant challenges the right of the Administrator to sue for the *penalties* prescribed in the statute." (Italics supplied.)

C. Bowles, Administrator, v. Adolph Silverman (U. S. Dist. Ct. So. Dakota, March 9, 1944), Vol. 4, War Law Service, par. 51,118; see page v of appendix.

In this case the Court said:

"It is true that this statute in its nature is a penal statute, at least in so far as the defendant is concerned."

Accordingly, under both the long established rules of law, as well as under the various decisions already rendered by the Federal Courts, in actions brought by the government under said Section 205(e), it is clear, and very definitely settled and established, that Section 205(e) in so far as it purports to render the seller of commodities liable to the government, is penal; and the liability thus imposed is not as "compensation" for any injury, but rather as punishment, and "penalty."

Statutes Which Are Penal in Nature, but Which Are Vague or Uncertain as to the Acts or Standard of Conduct Giving Rise to the Imposition of the Penalty, Are Invalid and Void as in Violation of the Due Process Clause.

The statement of law, as contained in the foregoing heading, is so well settled that extended argument on the point is unnecessary.

Some of the leading cases on the subject are as follows:

Gorin v. U. S., 312 U. S. 19, 85 L. Ed. 488;

U. S. v. Cohen Grocery Co., 255 U. S. 81;

Cline v. Frink Dairy, 274 U. S. 445;

Connally v. General Construction Co., 269 U. S. 385;

Collins v. Kentucky, 234 U. S. 634;

Lanzetta v. New Jersey, 306 U. S. 451;

American Seeding Machine Co. v. Kentucky, 236 U. S. 660;

Weeds v. U. S., 255 U. S. 109;

International Harvester Co. v. Kentucky, 234 U. S. 216;

Tedrow v. Lewis Company, 255 U. S. 98;

Kinnane v. Detroit Creamery Co., 255 U. S. 102.

Existence of State of War Does Not Suspend the Guarantee of Due Process.

That the existence of a state of war does not suspend the guarantees of the Fifth Amendment, nor relieve Congress from the limitations of that amendment, is well settled.

Mr. Chief Justice White, in the opinion in *U. S. v. Cohen Grocery Co., supra,* said:

> "We are of the opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees of the fifth and sixth amendments as to questions such as we are here passing upon. *Ex parte Milligan*, 4 Wall. 2, 121-127; Monongahela Navigation Co. v. U. S., 148 U. S. 312, 336; U. S. v. Joint Traffic Association, 171 U. S. 505, 571; McCray v. U. S., 195 U. S. 27, 61; U. S. v. Cress, 243 U. S. 316, 326; Hamilton v. Kentucky Distilleries, 251 U. S. 146, 156. It follows that, in testing the operation of the Constitution upon the subject here involved the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view."

If that penal provision is so worded that those various United States Judges, after carefully studying and considering the language and the act, arrive at contrary and conflicting understandings as to the meaning of the words, then that language used in the section is obviously vague and uncertain, and in law it *cannot* serve as a legal basis for the imposition of a penalty upon ordinary citizens who presumably, and actually, are less versed in statutory interpretation than are those learned judges. And the Su-

preme Court approved that test when in its decision in *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, at 90, it said:

> "And that this is not a mere abstraction finds abunddant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them is vividly portrayed.
>
> "As illustrative of this situation we append in the margin (see 225 U. S. 90) a statement from one of the briefs on the subject. And again the condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers (doubtless inspired by a zealous effort to discharge their duty) to establish a standard of their own to be used as a basis to render the section possible of execution."

And from the standpoint of conscience and morals, that vague and uncertain language of Section 205(e) *should not be permitted* to serve as a basis for the imposition of a penalty against ordinary citizens who must necessarily guess or surmise, but at their own peril, as to its meaning.

The due process clause was written as a guarantee to lay people, that they should never be called upon to guess or surmise, at their peril; and that acts which provide for the imposition of a penalty must be clear, certain and plainly understandable language, otherwise they are void; and that if Congress enacts any penal statute or section, which is vague or uncertain as to the particular acts, or standard of conduct giving rise to the imposition of the penalty, then Congress has acted beyond, and in excess

of, its constitutional powers, and the fruit of its overreaching action is void.

However, the indisputable fact remains that the United States District Courts at widely separated points over the nation, in cases brought before them under Section 205(e) have arrived at various and wholly conflicting conclusions as to the meaning of the phrase "in the course of trade or business" as used in that section. Some of the cases, in the order of their determination are:

Bowles, Administrator, v. Glick Bros. Lumber Co., 52 Fed. Supp. 913, decided December 2, 1943 by U. S. District Judge Hall of Los Angeles;

Bowles, Administrator, v. Chew, 53 Fed. Supp. 787, decided January 13, 1944 by U. S. District Judge Goodman of San Francisco;

Bowles v. Strickland (D. C. Ga), 55 F. S. 132;

Bowles v. Rock, 55 F. Supp. 865;

Bowles v. Beatrice Creamery Co., 56 Fed. Sup. 805;

Bowles, Administrator, v. Silverman, decided March 9, 1944 by U. S. District Judge Wyman of South Dakota;

Brown, Administrator, v. Molloy, decided March 10, 1944 by U. S. District Judge Welsh of Pennsylvania;

Bowles, Administrator, v. Seminole Rock & Sand Co., decided March 28, 1944 by U. S. District Judge Akerman of Florida;

Bowles, Administrator, v. Denunzio Fruit Co., 55 Fed. Supp. 9 ,decided May 3, 1944 by U. S. District Judge Miller of Kentucky;

Bowles, Administrator, v. Sieffs, decided May 4, 1944 by U. S. District Judge Joyce of Minnesota;

Bowles, Administrator, v. Smith Lumber Co., Action No. 22760-R in the U. S. District Court, San Francisco. Decided on May 29, 1944 by U. S. District Judge Roche. No opinion rendered.

The wide variety of conflicting interpretations put upon the language "for use or consumption other than in the course of trade or business" as used in Section 205(e), by United States District Judges, at widely separated points over the country, demonstrates more clearly and conclusively than any argument that might be presented by us, that that language is vague, indefinite and uncertain; and that it is not merely *capable* of various interpretations, but that judges, long trained and skilled in the interpretation of statutes, after careful study of the language, find themselves in complete disagreement as to the meaning of the phrase.

The various conflicting interpretations of the enlightened United States District Judges in the cases above cited may be briefly stated as follows:

The case of *Prentiss Brown, Administrator, v. Glick Bros. Lumber Co.,* 52 Fed. Supp. 913, was decided by United States District Judge Pierson Hall of Los Angeles, on December 2, 1943, and is the action involved in this appeal. In that case Judge Hall announced his understanding and interpretation of Section 205(e) as authorizing "government suit" *only* when the overceiling sale was made by a "bootlegger or black market operator"; but in all cases where the sale was made by anyone

regularly engaged in the business of dealing in the particular commodity, either as a producer, wholesaler, or retailer, the exclusive right to sue is vested in the purchaser.

The case of *Chester Bowles, Administrator, v. Chew*, 53 Fed. Supp. 787, was decided by U. S. District Judge Goodman of San Francisco, on January 13. 1944. The *Chew* case, like the *Glick* case, involved sales of lumber; and Judge Goodman commented upon and disagreed with Judge Hall's understanding and interpretation of Section 205(e). Judge Goodman stated his understanding and interpretation of "for use or consumption in the course of trade or business" to be and mean a purchase by a dealer or middleman for resale; that "merchants engaged in business buying and selling between themselves, were not given the right to sue," and that in such cases the liability of the seller is to the Government. Although Judge Goodman does not *expressly* so state, it would seem from his decision that he understands that a purchase from a retailer, by a private person, not a dealer or middleman in the commodity involved in the sale, would constitute a purchase "for use or consumption *other* than in the course of trade or business."

The case of *Chester Bowles, Administrator, v. Silverman*, was decided by U. S. District Judge Wyman of South Dakota on March 9, 1944. In the *Silverman* case, Judge Wyman held that where various farmers purchased farm machines (combines) from a local machinery dealer, for use on their respective farms, such purchases were made "for use or consumption *in* the course of trade or business" (to-wit: the farming business); and that under Section 205(e), which the Court held to be a penal sec-

tion, the exclusive right to sue and recover the penalty, was vested in the Government.

The case of *Prentiss Brown, Administrator, v. Molloy* was decided by U. S. District Judge Welsh, of the Eastern District of Pennsylvania on March 10, 1944. In the *Molloy* case Judge Welch held that where various farmers purchased farm machines, for use on their respective farms, such purchases were made "for use or consumption *other* than in the course of trade or business," and that therefore under Section 205(e) the exclusive right to sue is vested in the farmers, not in the Government. It will be noted that Judge Welsh's understanding and interpretation of "for use or consumption in the course of trade or business" is directly contrary to the understanding and interpretation of Judge Wyman in the *Silverman* case.

In his decision Judge Welsh discusses the decision in the *Silverman* case, and in disagreeing with that interpretation he pointed out its lack of logic in the following language:

> "There would seem to be no logical reason for restricting the privilege to only those persons who buy articles for uses not in any way connected with their trade or business. Such interpretation would mean that a purchaser of a tractor for use on his farm would not be entitled to the redress provided, but a purchaser who bought the same kind of appliance for use in the cultivation of his private estate not maintained as a business would have the right to recover treble the overcharge."

The case of *Chester Bowles, Administrator, v. Seminole Rock & Sand Co.*, was decided by U. S. District Judge Akerman of Florida, on March 28, 1944. In

this *Seminole* case Judge Akerman held that where the defendant Rock and Sand Company sold ballast to a railroad company for use by it in its business, in ballasting its roadbeds, the sale is to a consumer, rather than a middleman, and the purchase was made "for use or consumption *other* than in the course of trade or business"; consequently no Government suit can be maintained because the exclusive right to sue is vested in the purchaser. And Judge Akerman, in interpreting Section 205(e) held that "it makes no difference whether an ultimate consumer is the housewife purchasing a can of soup or a railroad purchasing a hundred thousand dollar diesel engine" for use in its business, it is nevertheless a purchase by an ultimate consumer and therefore "for use or consumption *other* than in the course of trade or business."

In other words, a purchase of any commodity by an ultimate consumer of the goods, is a purchase "for use or consumption *other* than in the course of trade or business." It will be noted that Judge Akerman's understanding and interpretation of the phrase in question is exactly opposite to the understanding and interpretation of Judge Wyman in the *Silverman* case.

The case of *Chester Bowles, Administrator, v. Denunzio Fruit Co.*, was decided by U. S. District Judge Miller of Kentucky on May 3, 1944. In this case Judge Miller in interpreting Section 205(e) held that where a retailer sells to a purchaser for his own use or consumption, such purchase is "for use or consumption *other* than in the course of trade or business" and only the purchaser may sue; but where a wholesaler sells to a retailer, the purchase is made "for use or consumption *in* the course of

trade or business," and in such latter event the exclusive right to sue is vested in the Government.

The case of *Chester Bowles, Administrator, v. Sieffs*, was decided by U. S. District Judge Joyce, of Minnesota, on May 4, 1944. In this case, Judge Joyce, in interpreting Section 205(e), held that if the purchaser bought the commodity to be used in any manner in connection with his (the purchaser's) business, regardless of what that business may be, the purchase is made "for use or consumption *in* the course of trade or business," and under Section 205(e) the exclusive right to sue is vested in the Government. In other words, Judge Joyce's understanding and interpretation of the phrase "in the course of trade or business" is virtually the same as is that of Judge Wyman in the *Silverman* case, but is in violent conflict and disagreement with the understandings and interpretations of Judge Welsh in the *Molloy* case, Judge Akerman in the *Seminole* case and Judge Miller in the *Denunzio* case.

The case of *Chester Bowles, Administrator, v. Smith Lumber Co.* was before Judge Michael Roche of San Francisco, on May 29, 1944. (No. 22,760-R.) In this *Smith* case, the Government sued for money under Section 205(e). A motion to dismiss was filed. The record on the motion to dismiss established clearly that the defendant was a retail dealer in lumber, and that the sales involved were all at retail, to consumers who purchased not for resale, but for their own use and consumption. Judge Roche overruled the motion to dismiss, but rendered no opinion, either oral or written. However, in the light of the motion and the record on that motion, Judge Roche's ruling is that where persons purchase lumber

from a retail dealer, for their own use or consumption, and not for resale, such purchases are "for use or consumption *in* the course of trade or business" within his understanding and interpretation of Section 205(e) and therefore, the Government is vested with the exclusive right to sue. Although the views of the various other U. S. District Judges over the country were and are at wide variance and disagreement as to the meaning of "for use or consumption in the course of trade or business," none of those courts understand or interpret the section as Judge Roche views and understands it. Judge Roche has an understanding and interpretation of "in the course of trade or business" which is different from that of *all* the other courts and judges.

We therefore respectfully submit that the various U. S. District Judges who rendered the decisions in the eight cases above mentioned were, and are, in hopless and irreconcilable conflict and disagreement as to the meaning of the phrase, "for use or consumption other than in the course of trade or business." Nothing could more clearly and conclusively demonstrate and establish the uncertainty and indefiniteness of the language in question than the fact that those judges, all of them most sincere and conscientious in their attempt to understand and interpret the language in question, arrived at such wholly different and conflicting conclusions as to the meaning of the language.

And when the courts and judges, as between themselves cannot, and do not, agree upon the meaning of the language "for use or consumption in the course of trade or business," we submit that the language is too vague

and uncertain to be understood by an ordinary lay person, or to operate as a legal basis for the imposition of a penalty against any lay person who "guesses wrong" as to the meaning which may be ultimately attributed to the language by the courts of last resort.

Accordingly, it is apparent from a mere reading and study of the language of Section 205(e), and particularly the words "for use or consumption in the course of trade or business," that the section is vague and uncertain as to the particular act or standard of conduct which will impose upon a seller a liability to the Government for the penalty provided in the section.

And the fact that in this particular case now at bar the views of the Government and the defendants and the judge below were all at sixes and sevens, and were in direct conflict with each other as to the meaning of the language in question, most convincingly indicates the vagary and uncertainty of the language.

And when we review the various and conflicting interpretations given the language by United States District Judges at widely separated points over the country, that, by rule of common sense as well as according to the test approved by the United States Supreme Court in *U. S. v. Cohen Grocery Co.* (quoted at pages 93-94, *ante*), is proof conclusive of the vagary and uncertainty of the meaning of the language "in the course of trade or business" as used in Section 205(e).

Section 205(e) Being Penal, Yet Being Vague and Uncertain as to the Acts or Standard of Conduct Which Result in the Imposition of the Penalty in Favor of the Government, Is Invalid and Void Because in Violation of, and Repugnant to the Due Process Provisions of the Fifth Amendment.

In the preceding sections of this brief (pages 83-94, *ante*) we have shown that Section 205(e), in so far as it renders a seller liable to the Government for treble the overcharge, is a penal section, and the amount recoverable by the Government is a "penalty," pure and simple.

And at pages 83-94, *ante,* we have shown at considerable length, that the language "for use or consumption other than in the course of trade or business" is actually vague, indefinite and uncertain.

At pages 83-94, *ante,* we have presented the law, as set forth in the decisions of the Supreme Court of the United States, wherein it is definitely and conclusively settled that where a penal statute or section is vague or uncertain as to the acts or conduct giving rise to the imposition of the penalty, such penal section or provision is invalid and void because in violation of the due process clause.

Consequently, Section 205(e) in so far as it attempts or purports to render a seller liable to the Government for treble the amount of the overcharge, is invalid and void because in violation of and repugnant to the due process clause.

Comments on the Judgment of the District Court.

It will be borne in mind that under the express provisions of Section 205(e) the Government may maintain an action *only* in cases where the buyer is "not entitled to bring suit or action." Consequently, the fact that the overcharged purchaser or purchasers were "not entitled to sue" was a condition precedent to any right on the part of the Government to bring or maintain suit in the case at bar; and no complaint of the Government could state a claim or cause unless it contained alleged facts showing the existence of the condition precedent.

In its complaint filed in the court below [R. 2], the Government, after accusing defendants of making sales of lumber at overceiling prices (the identity of the purchasers being undisclosed), then sought to plead its right to bring and maintain the suit, by including in its complaint the following allegation:

> "None of said purchases was made for use or consumption other than in the course of trade or business."

No other allegation is included in the complaint as a basis for any right on the part of the Government to bring or maintain the suit. And it will be observed that the above quoted allegation from the complaint was in the exact words of the statute (Sec. 205(e)), which provides that overcharged buyers (not the Government) have the exclusive right to bring suit when the purchase was made "for use or consumption *other* than in the course of trade or business."

As a ground of their motion to dismiss the complaint, defendants below asserted:

> "That Subsection (e) of said Section 205 of the Emergency Price Control Act of 1942 is unconstitutional and void and in violation of the Fifth Amendment to the Constitution of the United States."

In the court below, extended hearings of the matter were had, which were devoted principally to arguments and discussions as to the meaning of the words "for use or consumption other than in the course of trade or business," and the consequent right, or lack of right, of the Government to bring and maintain the action.

After those extended hearings were completed and Judge Hall had given careful thought and consideration to the matter, he rendered his considered opinion [R. 162] which he devoted principally to a discussion as to his understanding of the vague and uncertain phrase, "in the course of trade or business." And in the judgment rendered by him, he declared and adjudged [R. 197]:

> "That the nature of the action against defendants is penal; and the complaint is so vague, indefinite and uncertain as to fail to inform the defendants of the ground for claiming a penalty on any of the acts and facts constituting the basis of the Government's claim."

Of course, when Judge Hall determined, as he did, that the language "for use or consumption other than in the course of trade or business," as used in the complaint, was "vague, indefinite and uncertain," he necessarily determined that that identical language used in Section 205(e) was and is "vague, indefinite and uncertain."

Judge Hall therefore determined and adjudged:

(a) That the action is penal; and

(b) That the words "for use or consumption other than in the course of trade or business" are vague, indefinite and uncertain.

And having thus concluded, it was incumbent upon Judge Hall to apply the well settled applicable law, and declare Section 205(e) to be invalid, unconstitutional and void because in violation of the provisions of the due process clause.

However, Judge Hall, as is so apparent from his opinion, was most anxious to sustain the act itself, if possible; and in his zeal to sustain the section he held [R. 197]:

> "That Section 205(e) of the Emergency Price Control Act of 1942 is constitutional, but the attempted application by the plaintiff in this case is in violation of said act."

And he then proceeded to state his understanding and interpretation of "in the course of trade or business" as authorizing Government suits only in those cases where the overceiling sales were made by "bootleggers" or "black market operators."

Quite obviously, Judge Hall's judgment is inconsistent in its component parts. If, as he quite properly concluded, (1) Section 205(e) is penal, and (2) the phrase, "in the course of trade or business" is vague, indefinite and uncertain, then Section 205(e), in so far as its penalty (Government suit) provisions are concerned, is invalid and void; and his conclusion that "Section 205(e) is constitutional" is necessarily both inconsistent and erroneous in so far as it holds the *penal* provisions of Section 205(e) to be valid and constitutional.

His action in dismissing the complaint was a correct and proper action; but under his findings above indicated, he should have declared Section 205(e) to be *unconstitutional* in so far as "Government suits" thereunder are concerned.

The case at bar is not the first instance of intrusion of the legislative department upon the constitutional right of the citizen to due process. There have been innumerable such instances in the past as is so evident from the past judicial decisions declaring various acts to be void. During World War I, Congress, desiring to avoid inflation by control of the prices of necessities, passed the Lever Act. That Act was subsequently declared unconstitutional and void by the Supreme Court because of the very same infirmities and faults that afflict the penalty provisions (government suit provisions) of the present Emergency Price Control Act, to-wit: It was penal in nature, yet was vague and uncertain as to the particular acts or standard of conduct which would result in the liability for the penalty.

U. S. v. Cohen Grocery Co., 255 U. S. 81;
Weeds v. U. S., 255 U. S. 109;
Tedrow v. A. T. Lewis Co., 255 U. S. 98;
Kinnane v. Detroit Creamery Co., 255 U. S. 102.

And in its decisions in the above cited cases, the Supreme Court made it very plain and clear that the existence of a state of war does not suspend the due process clauses of any other guarantee of either the Fifth or Sixth Amendments, or relieve Congress from their limitations.

VI.

Indefiniteness of Complaint Is Ground for Dismissal Where No Case Is Stated.

This Court erred in holding that "indefiniteness of the complaint is not a ground for dismissal." This holding is so far reaching that it would justify a complaint that John Doe sues James Brown for damages. Thus the Court would say that a complaint that contained merely the names of the parties and little or nothing more is not a ground for the dismissal of the complaint, even though the complaint is for a penalty though civil in nature.

We respectfully submit that the rules of civil procedure were not meant to supplant the constitutional guaranty and that sheer bald conclusions with nothing more in a civil case would be sufficient to state a claim or claims for which relief could be had. If the suit were for a series of promissory notes, would this Court be willing to say that one could sue for all of the notes in a combined suit without setting up the facts as to each note so that the Court, as well as the defendant, might know on what the suit is predicated? Is not the case at bar much stronger where the claim is for a penalty of forfeiture, which the law says must be strictly construed and in which separate claims exist for alleged claims of violations of the statute? While it is true that under Rule 12B of the Federal Rules of Civil Procedure a motion for a more definite statement or for a bill of particulars will lie, nevertheless this must be read in connection with other rules, even under the Rules of Civil Procedure which provide that facts must be stated which show a valid claim on its face. Under Rule 9 fraud, mistake, a condition of the mind must be stated with particularity. Also conditions precedent must be pleaded. While the new rules of Civil Procedure do

not govern all possible situations and since the Emergency Price Control Act was passed subsequent to the new rules having gone into effect and is itself rather unusual legislation, it can not be said that the rules themselves are exclusive and exclude even constitutional guarantees regarding the form and manner of pleading cases. Thus, in *Fleming v. Dierks Lumber and Coal Company*, 39 Fed. Supp. 237, the Court said:

> "I am of the opinion that the framers of the rules did not intend to permit a plaintiff to subject the defendant to the various processes of the court without first stating definite facts upon which a judgment might be based. . . .
>
> I do not think that rules 26-37 relating to depositions and discovery should supplant the requirement of pleadings sufficiently advising a defendant of the nature of the claim and enabling him to prepare his responsive pleading and generally prepare for trial. . . .
>
> A 'short and plain statement' must be reasonably definite or it will not be plain. A speedy, just and inexpensive trial cannot be had merely upon the filing of a notice of claim and then resorting to the expensive and indefinite procedure of discovery and depositions."

In *United States v. Johnson*, 53 Fed. Supp. 167, the Court held with reference to an indictment in an O. P. A. case:

> "Sufficient facts of a crime committed must be stated in an indictment to support a conviction. Specifically, the court and defendants must be able to determine this from the indictment, the statutes and the pertinent administrative regulations passed pur-

suant to the statutes. If the facts alleged may all be true and yet appear to constitute no offense, the indictment is insufficient. . . .

"The purpose of such requirements is to give a defendant the fair opportunity to prepare his defense and enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime. . . .

"It is impossible to glean from the allegations of each indictment, the Act, and the regulations what, in fact the ceiling price was for the commodity, notwithstanding that the prices mentioned in the indictments are the ceiling prices or are below the ceiling prices. Since the Act and the regulation do not establish any specific ceiling price for the commodity *sub judice*, defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner in which it arrived at this conclusion. It may be that the government's method of calculation is erroneous. If so, defendants should have the opportunity to challenge this defect if, in fact, it exists."

Judged by these standards, nothing is set out in the complaint that gives the Court or defendant fair notice of the case, nor does it give the Court or defendant an opportunity to determine whether a claim is stated. As this is a penal statute it should be strictly construed in the light of a penalty and as time and place are material elements in considering whether a complaint states jurisdictional facts (Rule 9(f), Rules of Civil Procedure), it is respectfully submitted that the complaint states insufficient jurisdictional facts.

In prescribing rules of procedure in civil actions, not even the Supreme Court of the United States may "mod-

ify, abridge, or enlarge the substantive rights of litigants under the Constitution of the United States or enlarge or diminish the jurisdiction of the Federal courts."

United States v. Sherwood, 312 U. S. 584, 85 L. Ed. 1058;

Shibbach v. Wilson, 312 U. S. 1, 85 L. Ed. 479.

The judgment of the Circuit Court attempts to "modify and abridge" the substantive rights of the appellees under the Constitution of the United States, to-wit, to be informed in a penal action of the nature and cause of the accusation with such particularity that even though the action is civil in form but penal in nature, it will inform the accused of what he has to meet so that both the Court, as well as all the parties, may be able to determine from the face of the pleadings whether there has been stated a claim for which relief can be had. Otherwise, an accused from whom the Government is seeking a penalty will be put to a long and expensive trial and expensive proceedings.

One of the constitutional rights which we think still is existent in the United States is the right not to be put to the expense of a trial if the complainant has no cause of action. If the action was criminal in form, a demurrer would lie. A motion to quash the indictment would lie, but being civil in form but penal in its effect, this Court has said that the same remedies do not exist, and that the accused must be required to answer and stand trial.

Under the Rules of Civil Procedure, the Court must act upon the claim for relief within twenty (20) days and any ruling upon the claim similar to the ruling on a demurrer places the case in the form where issue must be joined and the case set for trial.

See:

U. S. v. Solomon, 3 F. R. D. 411.

The court in that case held as follows:

"Rule 81 which relates to the general applicability of the Rules does not exclude civil suits for penalties though it does, in a limited measure, exclude 'forfeiture of property for violation of a statute of the United States' from their applicability. When Rule 1 is considered the question immediately arises as to whether a suit for a penalty or a forfeiture imposed as punishment for violation of a statutory inhibition as opposed to compensation for damages can be considered to be within the Rules regardless of Rule 81. Rule 1 reads: 'These rules govern the procedure in the district courts of the United States in all suits of a civil nature . . . with the exceptions stated in Rule 81.'

"In the case of Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, the court said, 'We are also clearly of opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.' Page 634 of 116 U. S., page 534 of 6 S. Ct. Again the court said on the same pages, 'As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that part of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.'"

VII.

The Circuit Court Erred in Holding That the Administrator Was Entitled to Maintain the Suit.

This Court, contrary to the holding of the District Court, says that Section 205(e) of the 1942 Act is to be read in conjunction with Section 4(a). The Court says that

> "The buyer in the course of trade or business is deemed by the statute to be *in pari delicto* with the seller, but one who buys for use or consumption other than in the course of trade or business—the ordinary commercial consumer—is not declared a violator. He is apparently thought to possess no choice in the matter."

There is nothing in the statute which justifies this conclusion nor is there anything in the Congressional history of the statute that justifies this conclusion. There is no reason to assume that a buyer who is willing to go into a store and pay 50 cents or $1.00 over the ceiling price in order to obtain a carton of cigarets or a bottle of whisky or gasoline is not as much *in pari delicto* as the seller, and we do not think that Congress thought so either but it was for the purpose of stamping out the black market operations and to give an incentive to doing so that Congress provided for suits by the non-commercial consumers for treble the damages.

And in the same incentive for revelation exists in the case of persons who buy in the course of business or trade as those who buy for individual use. Apparently neither

have any choice in the matter if they are to get the supplies which they are seeking. The butcher who must go to the wholesaler and wants rare meats which he wishes to purchase in lieu of having his competitor get them is equally affected.

The District Court, therefore, erred in holding that "in all other cases the right vests in the Administrator for the use and benefit of the nation as a whole."

The right of the Administrator to sue was not contained in any original legislative enactment. It was inserted in the last draft of the bill before it went to Congress and probably did not receive the inspection and scrutiny which Congress would have given to it had it not come in at the 11th hour. The right of the Administrator to sue is only essential in the event that no other remedy is existent and the purpose of the right is not supported by anything in the Congressional history of the Act.

It was error for this Court to rule on the suppression of the evidence, in view of the fact that the Court reversed the order dismissing the complaint. Under such circumstances, the order suppressing the evidence became an interlocutory order which was within the exclusive jurisdiction of the trial court, and the trial court should not be limited for further consideration of the motion. This Court has so held where this Court declined to consider an interlocutory order to suppress the evidence. (*Rosenwasser v. U. S.*, 145 F.(2d) 1015 (Ninth Circuit).)

The Circuit Court erred in its decision on the order suppressing the evidence. The Circuit Court has construed the evidence with relation to the motion to suppress the evidence, in direct conflict with the finding of the trial judge. It has always been heretofore held that the order suppressing the evidence was a function of the trial judge, and if it was supported by substantial evidence that the order would be sustained. (*Weeks v. U. S.* 232 U. S. 383, 58 L. Ed. 652; *Gouled v. U. S.*, 255 U. S. 298, 65 L. Ed. 647). This Court, however, has substituted itself for the trial court in construing the evidence but has not found that the trial court's findings were not supported, but ample and sufficient evidence.

VIII.

The Motion to Suppress Was Interlocutory and Therefore Should Not Have Been Reversed.

The Circuit Court erred in respect to the motion to suppress the evidence in that having reversed the order of dismissal there was no jurisdiction for this court to consider this interlocutory order and the decision of this court in effect precludes the trial court from reconsidering the motion with all the evidence before it. The trial court should have that jurisdiction, and this court was without jurisdiction to rule on the interlocutory order. Title 28, Section 225, does not give the Circuit Court jurisdiction to rule on interlocutory orders.

Cobbledick v. U. S., 309 U. S. 323.

IX.

The Emergency Price Control Act Was Not Designed as a Means of Providing the Administrator or His Agents the Right to Demand Money Under Threats. The Act Only Authorizes Actions for Damages When and If the Administrator Is the Proper Party to Bring the Action and to Collect the Same Only When and If Lawfully Proved.

Under cover of authority, Agents and Officers of the Office of Price Administration made demands for various sums of money prior to any action being filed in this case, which demands ranged from $14,000.00 to $90,000.00. [R. 26, 45, 53, 59, 82, 87, 106, 107, 118, 121, 145, 147.]

Investigators and agents of the Office of Price Administration admitted that they were showing a photostated copy of an invoice (clandestinely photostated after being sneaked out of the defendants' place of business) for the purpose of negotiating a settlement for $25000.00. [R. 43, 45.]

The Ninth Circuit Court thought there was nothing wrong with this. We respectfully submit that the Act does not authorize such claims nor such procedure. In the case of *Bowles v. Paila*, 56 Fed. Supp. 453-454, Judge Leibell said:

> "(2, 3) A defendant who violates the regulations set up pursuant to the Emergency Price Control Act, 50 U. S. C. A. Appendix, Sec. 901 *et seq.*, is subject to criminal prosecution, and also to an action for $50.00 or treble the amount of the excess charge in a suit by a person overcharged. No one can deprive the injured party of that right against the defendant. Yet under the terms of the proposed decree the 'vol-

untary' payment to the United States Treasurer 'shall be in lieu of the requirement herein of refund of said excess rent to tenants by defendants.' In my opinion this practice for so-called 'voluntary' payments to the United States Treasurer in cases of this kind is not authorized by the statute. No sanction for it should be embodied in a decree of this Court, even on consent. The Act itself contains all the remedies made available by the Congress and this is not one of them. Chapter 26, Title II, Sec. 205, 56 Stat. 33, Title 50 U. S. C. A. Appendix, Sec. 925."

X.

The Amendment to the Statute Terminates the Action as Filed Since the Filing of the Complaint.

1. Congress has amended the Emergency Price Control Act and has changed the right of a cause of action in many respects and has further implemented the right of the people with the constitutional guarantees of being able to be represented at any hearing by counsel and to have the testimony taken down.

2. No right of action exists for more than single "damages" or single the amount of the alleged overcharge unless the acts done are "wilful" or the result of failure to take practicable precautions against the occurrence.

3. Several courts have rendered different opinions attempting to construe the meaning of the words giving rise to a claim for which relief could be granted "other than in the course of business or trade" and also the meaning of the expression "in the course of business or trade."

4. A motion to discuss the action was filed in the Circuit Court and denied.

The Emergency Price Control Act of 1942 as originally enacted provided the following in Section 205(e):

> "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommoditions shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this act."

This Act was Public Law No. 421, 77th Congress, Chapter 26, Second Session (H. R. 590).

Section 1(b) of Title I of the Act provides as follows:

> "The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1944, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses

of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

These sections were amended by the Stabilization Act of October 2, 1942, Public Law 729, 77th Congress, Chapter 578, Second Session (H. R. 7565), which contained a saving clause as follows:

"Sec. 6. The provisions of this Act (except sections 8 and 9), and all regulations thereunder, shall terminate on June 30, 1944, or on such earlier date as the Congress by concurrent resolution, or the President by proclamation, may prescribe."

The Stabilization Extension Act of 1944, Chapter 325, page 383 (S. 1764) amended the Emergency Price Control Act of 1942 and provided therein as follows:

"(b) Section 202 of the Emergency Price Control Act of 1942, as amended, is amended by adding at the end thereof the following new subsection:

'(1) Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel.'"

Sub-section (e) is amended as follows:

"(b) Subsection (e) of section 205 of the Emergency Price Control Act of 1942, as amended, is amended to read as follows:

'(e) If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determined: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is in-

stituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.'

"(c) The amendment made by subsection (b), in so far as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter."

It is respectfully submitted that the changes in the section have so changed the right of the Administrator that no cause of action has now been stated under any circumstances.

The statute under which the action was brought and under which the complaint was drawn was 56 Statute 23, enacted January 30, 1942, Public Law 421—77th Congress. [R. 2.]

This law expired June 30, 1944. No saving clause was contained in the Stabilization Extension Act of 1944 and Section 205(e) was amended to change the applicable

provisions and circumstances under which an action could be brought. An action for treble damages does not lie under the statute as amended and under the complaint as alleged and the claim alleged therein.

No jurisdiction exists under the amended statute where there is no wilfullness.

The failure of the statute clearly to define who is or is not a buyer in the course of trade or business is a jurisdictional defect.

United States v. 11150 Pounds of Butter, 195 Fed. 657, and cases therein cited at page 663;

Todd v. United States, 158 U. S. 282, 39 L. Ed. 982;

Davies Warehouse v. Bowles, 88 L. Ed. 379.

Conclusion.

In time of War, where this Court is fighting to uphold the constitutional guarantees and the Bill of Rights, correct interpretation of the issues involved here are essential to the preservation of liberty. The judgment of the Circuit Court should be reversed and the Judgment of the District Court affirmed, as this would be an outstanding case to exemplify that we still believe in the principles enumerated by our Constitution in War as well as peace.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners.

APPENDIX.

Title 50, App., Sec. 925 (1942):

"(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

Title 50, App., Sec. 925 (1944) as amended:

"(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action

against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50 as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to

the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered."

Title 50, App., Sec. 922 (1942):

"Sec. 922. INVESTIGATION; RECORDS; REPORTS.

(a) The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4(a) (section 904(a) of this Appendix).

(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that

such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security. Jan. 30, 1942, c. 26, Title II, Sec. 202, 56 Stat. 30.

Title 50, App., Sec. 922 (1944):

"Sec. 922. INVESTIGATIONS; RECORDS; REPORTS.

(a) The Administrator is authorized to make such studies and investigations to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act (sections 901-946 of this Appendix), or in the administration and enforcement of this Act (sections 901-946 of this Appendix) and regulations, orders and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

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(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4(a) (section 904(a) of this Appendix).

(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

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49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

(i) Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel. Jan. 30, 1942, c. 26, Title II, Sec. 202, 56 Stat. 30, as amended June 30, 1944, c. 325, Title I, Sec. 105, 58 Stat. 637."

Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1945.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1213

GLICK BROTHERS LUMBER COMPANY, A CALIFORNIA CORPORATION, MAX GLICK, OSCAR GLICK, ADOLPH GLICK, DAVID GLICK, ISRAEL GLICK, AND LABEL GLICK, INDIVIDUALLY AND DOING BUSINESS AS GLICK BROTHERS LUMBER COMPANY, PETITIONERS

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum, findings of fact and conclusions of law of the district court (R. 161–173, 179–195) are not reported. The opinion of the circuit court of appeals (R. 479–492) is reported in 146 F. 2d 566.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 4, 1945 (R. 492). A petition

for rehearing, filed on March 15, 1945, was denied on March 26, 1945 (R. 493). The petition for a writ of certiorari was filed on April 27, 1945, and the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the statutory right of action under Section 205 (e) of the Emergency Price Control Act of 1942, as extended by the Stabilization Extension Act of 1944, is constitutionally vested in the Administrator when the commodity, the sale of which gives rise to the cause of action, is purchased for use or consumption in the course of trade or business.

2. Whether the complaint in this case should have been dismissed for indefiniteness.

3. Whether, on appeal from the district court judgment dismissing the complaint and from the order of that court suppressing evidence obtained by the Office of Price Administration, the circuit court of appeals had jurisdiction to reverse the order of suppression as well as the judgment of dismissal.

4. Whether the inspection of records which are kept pursuant to the mandate of the Emergency Price Control Act of 1942 constitutes an unreasonable search and seizure when carried on by duly authorized law enforcement officers acting without process but under statutory authority.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the statutes and regulations involved are set out in Appendix A, *infra*, pp. 16–22.

STATEMENT

On October 1, 1943, this action was brought by the Price Administrator against petitioners Glick Brothers Lumber Company, a California corporation, and its officers and stockholders under Section 205 (e) of the Act. The complaint was in three counts. In the first and third counts, the Price Administrator alleged that during the year ending September 30, 1943, the petitioners had sold lumber at prices in excess of those permitted by the General Maximum Price Regulation (Appendix A, *infra*, p. 19). In the second count, it was alleged that during the same period petitioners had sold lumber at prices in excess of those permitted by Maximum Price Regulation No. 215 (Appendix A, *infra*, p. 22). The complaint stated that none of the lumber alleged to have been sold at excessive prices was purchased by the respective buyers for use or consumption other than in the course of trade or business. A judgment was asked in the sum of $34,695.18, being three times the amount by which the prices charged by petitioners exceeded the maximum prices permitted by the applicable regulation. (R. 2–6.)

Petitioners moved to strike the complaint and dismiss the action (R. 11–12, 15–16). Petitioners also moved to suppress evidence gathered by Office of

Price Administration investigators on the ground that it had been obtained by an unlawful search and seizure in violation of rights guaranteed petitioners by the Fourth and Fifth Amendments to the Constitution of the United States (R. 6–10, 12–14).

The motion to suppress the evidence was heard on sharply conflicting affidavits (R. 17–148). It is undisputed, however, that on June 1, 1943, two investigators of the Office of Price Administration called at petitioners' place of business, and after displaying their credentials, requested permission of the Lumber Company's general manager, Max Glick, to inspect its invoices of sales and purchases of lumber (R. 27, 28, 40, 49). It is further agreed that the petitioners made the invoices available to them and assigned them a room at petitioners' office in which they might inspect these papers (R. 27, 38, 50). The investigators swore that petitioners did so voluntarily. Petitioners, on the other hand, swore that they did so because the investigators told them that they would make things "awfully tough" for petitioners if the records were not made available (R. 49) (a charge denied by the investigators (R. 114, 133)) and because they (petitioners and their employees) were "inspired by fear and apprehension of the great and almost unlimited power of the Office of Price Administration and of its officers and agents", and thought that "serious and dire consequences" would result if they failed to comply with the investigators' request (R. 49, 63).

The investigation was conducted from on or about

June 1, 1943, to and including June 15, 1943, and from July 26, 1943 to August 15, 1943 (R. 31). Thereafter, there were a few sporadic visits until September 15, 1943 (R. 74). During the entire time that the investigation was in progress, no objection was made by petitioners to the investigators' examination of the invoices until August 13, 1943, when petitioners served a notice on the investigators and on the Office of Price Administration objecting to the investigation as an illegal search and seizure (R. 57, 72, 83, 94, 103). A similar notice was served on September 10, 1943 (R. 60, 96, 104). Until the service of the notice of August 13, 1943, there is nothing in any of the affidavits tending to show that the investigation was not conducted with the acquiescence of petitioners.

During the course of the investigation, certain delivery slips and invoices containing alterations and interlineations which could not be accurately shown by the ordinary process of copying were taken out of petitioners' office and photostated. The originals were returned promptly thereafter. (R. 31.) Petitioners claimed that the removal and photostating was done without their knowledge or consent (R. 18, 22, 25, 65). The photostatic copies, however, were produced and discussed in detail at conferences held from time to time with petitioners and their counsel (R. 85–86) and no objections were made as to the fact and manner of their procurement (R. 32–34, 42–45, 57, 83).

The major part of the affidavits submitted by petitioners relates not to the investigation of petitioners'

records, but to six or more conferences and interviews between the petitioners and their representatives on the one hand and representatives of the Office of Price Administration on the other, at which the liability of the petitioners was discussed. All of these conferences took place while the investigation was in progress. (R. 32–35.) The petitioners assert that the representatives of the Office of Price Administration acted at these conferences in a high-handed and intimidating manner, demanding of the defendants sums varying from $25,000 to $90,000. As a result, it was alleged that the individual petitioners suffered various forms of nervous and physical disabilities. (R. 67, 71, 80, 81.) Almost every allegation contained in the affidavits submitted by the petitioners as to what occurred at the conferences is denied by affidavit submitted by the respondent (R. 27, 38, 105, 124). Specifically, all allegations as to threats, intimidation, coercion, and high-handedness are unequivocally denied (R. 35, 36, 46, 106–107, 108–109, 115–116, 119, 121–122, 125–126, 127–128, 129–130, 134). At least from the time of the first conference, the petitioners were represented by counsel (R. 85–86).

On these sharply conflicting affidavits and without hearing any oral evidence, although respondent's investigators were present in court and respondent at three different times requested that they be heard (R. 293, 316, 421), the district court adopted findings of fact consisting of a summary of the facts alleged in the affidavits submitted by petitioners, and sustained the motion to suppress the evidence (R. 179–195). The

court order provided that all documents taken from petitioners' files should be returned along with any copies made thereof, and that "the United States of America is barred from using any such invoices, bills, records, data or information, or any matters obtained therefrom, directly or indirectly, in any court or any proceeding of any kind or character whatsoever" (R. 194–195). At the same time, the court sustained petitioners' motion to dismiss the complaint (R. 196–198).

The Administrator appealed from both judgments (R. 199). A stay of the order suppressing the evidence having been denied by the district court (R. 469), the Administrator applied to the circuit court of appeals for a suspension of that order pending appeal. That court ordered all of the evidence which the district court had ordered suppressed impounded (R. 200). Pursuant to this order, the Administrator deposited all of the evidence with the Clerk of the district court whose receipt therefor is printed as Appendix B of this brief (*infra*, pp. 23–26). The circuit court of appeals reversed both the judgment of dismissal and the order suppressing the evidence (R. 492–493).

ARGUMENT

1. The holding of the court below that Section 205 (e) of the Emergency Price Control Act of 1942 (Appendix A, *infra*, p. 17) vests in the Administrator the right to sue alleged violators when the commodity is purchased for use or consumption in the course of trade or business is compelled by the

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plain words of the statute.[1] Moreover, the legislative history is unequivocal. The Senate Committee stated that Section 205 (e) "will permit private purchasers who buy for private use or consumption, rather than in the course of trade or business, to protect themselves against violations of the act"; "if a buyer * * * is not entitled to bring such action, because he is a buyer in the course of trade or business, or for other reasons the Administrator may bring such action against the seller on behalf of the United States." S. Rep. No. 931, 77th Cong., 2d Sess., pp. 8, 26.

Thus the appellate courts to which this problem has been presented have consistently taken the same view of the Administrator's standing as that taken by the court below. *Lightbody* v. *Russell*, 293 N. Y. 492; *Bowles* v. *Franceschini*, 145 F. 2d 510 (C. C. A. 1); *Bowles* v. *Seminole Rock and Sand Co.*, 145 F. 2d 482 (C. C. A. 5), certiorari granted on another issue, No. 914, this Term; cf. *Speten* v. *Bowles*, 146 F. 2d 602 (C. C. A. 8), certiorari denied, April 23, 1945; *Bowles* v. *Hastings*, 146 F. 2d 94 (C. C. A. 5).

The petition for a writ of certiorari in *Speten* v. *Bowles*, No. 999, this Term, raised an issue much like that here involved, and we respectfully refer the Court to the Brief in Opposition filed in that

[1] A reading of Section 108 (b) and (c) of the Stabilization Extension Act of 1944 (Appendix A, *infra*, pp. 17–19) makes it clear that that Act does not deprive the Administrator of this right. Compare *Speten* v. *Bowles*, 146 F. 2d 602, 605 (C. C. A. 8), certiorari denied, April 23, 1945. See also *United States* v. *Powers*, 307 U. S. 214.

case, not only for an analysis of the purpose of the "standing" provisions of the statute (pp. 5–7), but also for what, we submit, is a complete answer to petitioners' argument in this case (Br. 76) that the statute is void if it does vest in the Administrator the right of action here claimed (No. 999, Br. in Opp. 8–9).

Petitioners' remaining constitutional objection to Section 205 (e) is that the provision for suit by the Administrator when the commodity is not sold "for use or consumption other than in the course of trade or business" is too vague and indefinite (Br. 77–83). Granting, *arguendo*, petitioners' assumption that this is a "vague" provision, we submit that its invalidity does not follow. The asserted ambiguity does not leave petitioners or anyone else in any doubt as to whether a given act or omission is illegal under the Act and the regulations issued pursuant to its provisions. Cf. *United States* v. *Ragen*, 314 U. S. 513. If a price regulation is violated, the violator is subject to suit, and he is not deprived of any constitutional right even if he cannot tell whether the plaintiff in such a suit will be the Administrator or the purchaser. Such a doubt is of no constitutional moment. Cf. *Robinson* v. *United States*, No. 514, this Term, slip opinion, pp. 3–4.

2. The court below committed no error in holding that "indefiniteness of the complaint is not a ground for dismissal" (R. 480). If petitioners find the complaint unenlightening as to the details of their alleged violation, their remedy will be to move for a more

definite statement or for a bill of particulars under Rule 12 (e) of the Rules of Civil Procedure. Conceivably, a complaint may be so vague and indefinite as to fail to state a claim upon which relief may be granted, but no such case is presented here. The complaint is manifestly sufficient to withstand a motion to dismiss. *Clyde* v. *Broderick*, 144 F. 2d 348 (C. C. A. 10); *Continental Collieries* v. *Shober*, 130 F. 2d 631, 635 (C. C. A. 3); *Dioguardi* v. *Durning*, 139 F. 2d 774 (C. C. A. 2).

3. Concededly having the power to reverse the judgment of the district court dismissing the complaint, the circuit court of appeals undoubtedly had the power, at the same time, to reverse the order suppressing the evidence. In *Deckert* v. *Independence Corp.*, 311 U. S. 282, 287, the circuit court of appeals concededly had the power to hear an appeal from the issuance of a temporary injunction, and this Court held, in accordance with a long line of authority, that the circuit court of appeals could also pass on the denial by the district court of a motion to dismiss, although such a denial would not ordinarily be appealable. To deny to the court below the power to deal with the motion to suppress the evidence would merely make for delay and give rise to no compensating advantages. With the case before the circuit court of appeals, efficient judicial administration required that the trial court be guided as fully as was possible at that stage of the proceeding. In any event, this jurisdictional question is entirely academic, since, on remand, the district court, in

deference to the views of the circuit court of appeals, will undoubtedly set aside its order of suppression.

4. Insofar as it pertains to the right of the Administrator and his representatives to inspect records, the ruling of the court below is of very limited and narrow application. Contrary to petitioners' extravagant claims, it does not hold, either expressly or by implication, that "everybody's records are quasi public records, whether in their private vault" (Br. 61) or that "the provisions of the Emergency Price Control Act of 1942 permit any investigators [of the Office of Price Administration] to go into any man's place of business and rummage at will" (Br. 56), or that the Fourth and Fifth Amendments afford less protection, or should be construed more narrowly, in war than in peace. It does not sanction or approve "fishing expeditions" or "exploratory searches", or any other invasion of the rights and liberties guaranteed by the Bill of Rights.

Section 202 (b) of the Price Control Act (Appendix A, *infra* p. 16) authorizes the Administrator

> by regulation or order, to require any person who is engaged in the business of dealing with any commodity * * * to furnish [such information as he deems necessary or proper to assist him in the administration and enforcement of this Act (Section 202 (a))] under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents * * *.

Section 1499.12 of the General Maximum Price Regulation (Appendix A, *infra*, p. 21) provides that:

> Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this Regulation, shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services.

In addition, Section 15 of Maximum Price Regulation No. 215, applying specifically to the lumber industry, more particularly describes the records that must be kept (Appendix A, *infra*, p. 22).

Relying on these provisions, the decision below goes no further than to hold that the examination and inspection, by duly authorized law enforcement officers acting without process but under statutory authority, of records which are required to be prepared and kept subject to inspection by a valid law, does not constitute an unlawful search or seizure or invade any rights guaranteed by the Fourth and Fifth Amendments. In so holding, the decision is in accord with the decisions of all other appellate courts that have passed on the question.[2] *In re Sana Labo-*

[2] The principle on which the decision is founded was recognized in the opinions of this Court on which petitioners rely

ratories, 115 F. 2d 717, 718 (C. C. A. 3); *C. M. Spring Drug Co.* v. *United States*, 12 F. 2d 852, 857 (C. C. A. 8); *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. 2d 786, 789 (C. C. A. 3), certiorari denied, 268 U. S. 688; and see *United States* v. *Sherry*, 294 Fed. 684 (E. D. Ill.); *United States* v. *Mulligan*, 268 Fed. 893 (N. D. N. Y.).

The investigation involved in this case was not, as petitioners assert, a general exploratory search or "fishing expedition" such as were condemned in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, and *Hale* v. *Henkel*, 201 U. S. 43. It was limited to records relating to the sale of lumber during a limited period of time. Such a restricted examination on the corporate premises is not shown to have interfered unreasonably with the conduct of the lumber company's business. *Brown* v. *United States*, 276 U. S. 134; *Consolidated Rendering Co.* v.

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most heavily. Thus in *Boyd* v. *United States*, 116 U. S. 616, 623–624, this Court said:

"So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, *and the entries thereof in books required by law to be kept for their inspection*, are necessarily excepted out of the category of unreasonable searches and seizures." [Italics supplied.]

Again, in *Hale* v. *Henkel*, 201 U. S. 43, 77, this Court said:

"Of course, in view of the power of Congress over interstate commerce * * * we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment."

Vermont, 207 U. S. 541; *Wheeler* v. *United States*, 226 U. S. 478.

The investigation did not extend, moreover, to any private papers of petitioners. It was confined to records which petitioners were required by law to prepare and keep.[3] Records so required to be prepared and kept are, as the court below held, quasi public records, the inspection of which petitioners were under a legal duty to permit. *Wilson* v. *United States*, 221 U. S. 361, 383–384; *Bowles* v. *Insel*, 148 F. 2d 91 (C. C. A. 3); *Rodgers* v. *United States*, 138 F. 2d 992 (C. C. A. 6); *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7), certiorari denied, 311 U. S. 690. Access to the records was not obtained by stealth or force. Petitioners yielded them, at first without objection and later under protest.[4] And since petitioners were under a legal obligation to surrender the records for inspection, the investigation did not bear the slightest resemblance to the

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[3] This is shown by the receipt given by the Clerk (Appendix B, *infra*, pp. 23–26) for the evidence which the district court ordered suppressed and which the circuit court of appeals ordered impounded pending appeal.

[4] The court below stated (R. 486) that the affidavits "of the individual defendants are neither forthright nor clear; as regards the matter of consent, their contents are vague and argumentative to the point of evasiveness. Assuming that the threats of dire consequences were made as charged, it is hardly credible that these experienced businessmen, with counsel at their elbow, understood them in any other sense than that statutory sanctions would be invoked or legal steps taken to compel the production of the sales records if voluntary access to them were refused."

unreasonable searches and seizures condemned in the cases on which petitioners rely. No constitutional rights of the petitioners were invaded nor is the decision of the court below to be construed as sanctioning or permitting any such invasion.

CONCLUSION

The decision below is correct and there is no conflict. Consequently, the petition for a writ of certiorari should be denied.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

FLEMING JAMES, JR.,
Director of Litigation Division,
DAVID LONDON,
Chief of the Appellate Branch,
A. M. DREYER,
Attorney,
Office of Price Administration.

MAY 1945.

APPENDIX A

Section 2 of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. (Supp. III) 901, *et seq.* authorizes the Price Administrator, by order or regulation, to establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the act. Section 202 (a) reads as follows:

> The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

Section 202 (b) provides:

> The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

Section 205 (e) of the Act as originally enacted read as follows:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

As amended by Section 108 (b) of the Stabilization Extension Act of 1944 (58 Stat. 640, 50 U. S. C. A. App. 925 (e)), the Section now provides:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade

or business may, within one year from the date of the occurence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under the subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be

> barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

Section 108 (c) of the Stabilization Extension Act of 1944 provides that:

> the amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.

The General Maximum Price Regulation (7 F. R. 3153, 8 F. R. 3096) was issued on April 28, 1942, under Section 2 of the Act. The pertinent provisions of the regulation are Sections 1499.2, 1499.11, 1499.12, 1499.13. Section 1499.2 establishes the maximum prices at which any seller may lawfully sell any of the commodities subject to the regulation, including certain species of lumber and lumber products; these are the highest prices charged by the seller therefor during March 1942.

Section 1499.11, 1499.12 and 1499.13 provide respectively as follows:

§ 1499.11. *Base-period records.*—Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this Regulation, shall:

(a) Preserve for examination by the Office of Price Administration all his existing *records* relating to the prices which he charged for such of those commodities or services as he delivered or supplied during March 1942, and his offering prices for delivery or supply of such commodities or services during such month; and

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during the ordinary business hours, a statement showing:

(1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March 1942, and his offering prices for delivery or supply of such commodities or services during such month, together with an appropriate description or identification of each such commodity or service; and

(2) All his customary allowances, discounts, and other price differentials.

Any person, other than a person selling at retail, who claims that substantial injury would result to him from making such statement available to any other person, may file it with the appropriate field office of the Office of Price Administration. The information contained in such statement will not be published or disclosed unless it is determined that the withholding of such information is contrary to the purposes of this Regulation.

§1499.12. *Current records.*—Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services.

§ 1499.13. *Maximum Prices of cost-of-living commodities—statement, marking, or posting.*—For the purposes of this section, a cost-of-living commodity is any commodity designated as such by the Price Administrator. A list of the classes of commodities so designated appears in sec. 1499.25, Appendix B, of this Regulation.

(a) On and after May 18, 1942, every person offering to sell a cost-of-living commodity at retail shall mark the maximum price of such commodity in a manner plainly visible to, and understandable by, the purchasing public. The maximum price may be marked on the commodity itself or on the shelf, bin, rack, or other holder or container upon or in which the commodity is kept, or it may be posted at the place in the business establishment where the commodity is offered for sale * * *. The maximum price shall be stated as follows: "Ceiling Price $_____," or "Our Ceiling $_____." Any person choosing to post by price-lines the maximum prices of commodities in the classifications marked by asterisks in sec. 1500.25, Appendix B, shall post the maximum price by price-line at the place in the business establishment where the commodities in such price-line are offered for sale,

and, in addition, shall mark the selling price of each such commodity on the commodity itself.

(b) On or before July 1, 1942, every person offering to sell cost-of-living commodities at retail shall file with the appropriate *War Price and Rationing Board* of the Office of Price Administration a statement showing his maximum price for each such commodity, together with an appropriate description or identification of it. Such statement shall be kept up to date by such person by filing on the first day of every month a statement of his maximum price for any cost-of-living commodity newly offered for sale during the previous month, together with an appropriate description or identification of the commodity.

Maximum Price Regulation No. 215 (8 F. R. 8705) was also issued under Section 2 of the Act. It establishes the maximum prices which may lawfully be charged by distribution yards for certain species of lumber or lumber products at the mill prices therefor, which are fixed by separate regulations, plus specified mark-ups.

Section 15 of the Regulation reads as follows:

What records must be kept.—All distribution yards must keep records which will show a complete description of the items of lumber sold (i. e., grade, condition of dressing, quantity, etc.), the name and address of the buyer, the date of the sale and the price for a period of two years. They must keep similar records of all purchases.

APPENDIX B

In the District Court of the United States, Southern District of California, Central Division

No. 3177 PH Civ.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PLAINTIFF

v.

GLICK BROTHERS LUMBER COMPANY, A CALIFORNIA CORPORATION, MAX GLICK, OSCAR GLICK, ADOLPH GLICK, DAVID GLICK, ISRAEL GLICK AND LABEL GLICK, INDIVIDUALLY, AND DOING BUSINESS AS GLICK BROTHERS LUMBER COMPANY, ET AL., DEFENDANTS

RECEIPT

Received from Chester Bowles, Administrator of the Office of Price Administration, plaintiff in the above-entitled matter, and Morris Lavine, attorney for the above-named defendants, the following documents and evidence heretofore ordered by the Circuit Court of Appeals of the Ninth Circuit, by order dated January 24, 1944, to be impounded in the United States District Court, Southern District of California, Central Division, until further order of said Circuit Court of Appeals:

1. Information sheet, being a survey of mill manifests, received from six mills by defendants, consisting of one page, numbered Exhibit "1".

2. Financial statement of defendant corporation, prepared by H. E. Young & Company dated July 21, 1943, containing condensed balance sheet as of

June 30, 1943, and statement of profit and loss covering period from January 1 to June 30, 1943, numbered Exhibit "1–2".

3. Five photostats clipped together, being Lumber Estimate Nos. 00064; 04201; 04202 and 07979, and Dray Ticket No. 14957, all of Glick Brothers Lumber Company and numbered Exhibit "3".

4. Three photostats clipped together, numbered Exhibit "4" being Lumber Estimate Nos. 01390, 04668 and 07624 of defendant corporation.

5. Copy of letter dated April 28, 1943, from Owen Rhodes to Mr. J. B. Allen, numbered Exhibit "4–2".

6. Five photostats clipped together, numbered Exhibit "5", being Lumber Estimate Nos. 04397, 07926 and 04399, and Dray Tickets Nos. 25393 and 25391, of the defendant corporation.

7. Copy of letter dated June 9, 1943, from James I. Barnes Construction Co. to Glick Brothers Lumber Company, numbered Exhibit "5–2".

8. Photostat of Lumber Estimate No. 07074 of defendant corporation, together with two riders, numbered Exhibit "6."

9. Copy of letter dated June 14, 1943, from Glick Brothers Lumber Company to James I. Barnes Construction Company, numbered Exhibit "6–2."

10. Three photostats clipped together, numbered Exhibit "7," being Lumber Estimate Nos. 01549 and 03126 and 07210, of the defendant corporation.

11. Information Sheet, being a transcript of sales of U. S. Engineers, San Bernardino, consisting of one sheet and numbered Exhibit "13–2."

12. The Information Sheet, being a list of 94 jobs furnished by defendants to World Home Builders and Golden State Land and Investment Company,

consisting of one sheet and being numbered Exhibit "18–2."

13. Statement of Max Glick, dated June 3, 1943, sworn to before John A. Cristiansen, Investigator, Office of Price Administration, together with rider attached, consisting of three pages and being numbered Exhibit "A–2."

14. Work sheets of OPA investigators, containing a transcript of overcharges made during April 1943 by defendants, consisting of six pages and being numbered Exhibit "B."

15. Work sheets of OPA investigators, containing a transcript of overcharges by defendants, consisting of a total of eighty-nine pages and being numbered Exhibit "B–2," as follows:

September 1942, one page.
October 1942, five pages.
November 1942, twenty-three pages.
December, eight pages.
January 1943, one page
February 1943, one page

August 1942, one page.
September 1942, six pages.
October 1942, seven pages.
November 1942, two pages
December 1942, five pages.
January 1943, six pages.
February 1943, four pages.
March 1943, three pages.
April 1943, seven pages.
May 1943, four pages.
June 1943, two pages.
July 1943, three pages.
(Total, eighty-nine pages.)

16. Work sheets of OPA investigators, containing a transcript of overcharges made during October 1942

by defendants, consisting of fifteen pages and being numbered Exhibit "C."

17. Work sheets of OPA investigators, containing a transcript of mill manifests of lumber received by defendant corporation, consisting of seven pages and numbered Exhibit "C–2."

18. Copy of Basing List "U," Lumber, Los Angeles, effective July 31, 1941, numbered Exhibit "D–2."

19. Work sheets of OPA investigators, containing list of sales of rough lumber sold to Barnes Construction Company by defendant corporation from period of July 1942 to March 1943, consisting of two sheets and one rider (not numbered as exhibit).

20. Work sheet of OPA investigators, being a recapitulation of Barnes Construction Company account with defendant corporation, consisting of one page (not numbered as exhibit).

Dated February 14, 1944.

EDMUND L. SMITH,
Clerk of the United States District Court,
Southern District of California,
Central Division.

By JOHN A. CHILDRESS,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1945